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Supreme Court of the United States

OCTOBER TERM, 1995

K.R.R., An Infant, By Her Parents and Next Friends, M.R. and K.R.R., andM.R. and K.R.R.,

Petitioners,

v.

ANDERSON COMMUNITY SCHOOL CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether IDEA, and its accompanying regulations, requires Anderson Community School Corporation to provide K.R., a child with disabilities as defined in IDEA, an instructional assistant on site at a private parochial school where K.R.'s parents have voluntarily chosen to enroll her.

II. Whether the Anderson Community School Corporation's conduct, of refusing to provide the necessary instructional assistant to K.R. at the private parochial school, violates the neutrality principle of the clauses of the First Amendment.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the petitioners K.R., an infant, by her parents and next friends M.R. and K.R.R., and M.R. and K.R.R., and the respondent, Anderson Community School Corporation.

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In The
Supreme Court of the United States
October Term, 1996

K.R.R., an infant, by her parents and next
friends M.R. and K.R.R.,
and M.R. and K.R.R.,

Petitioners,

v.

Anderson Community School Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is dated April 12, 1996 and is reported at 81 F.3d 673, 23 IDELR 1137 (7th Circuit 1996) and is reprinted at pages A-1 through A-13 of the appendix to this petition. The Seventh Circuit's Order Denying Petition for Rehearing With Suggestion for Rehearing En Banc, dated May 28th, 1996, is unreported and is reprinted at pages A-14

through A-15 of the appendix to this petition. The Memorandum Opinion entered by the United States District Court for the Southern District of Indiana is reported at 887 F. Supp. 1217, 22 IDELR 724 (S.D. Indiana 1995) and is reprinted at pages A-16 through A-41 of the appendix to this petition. The Findings of Fact, Conclusions of Law and Decision of the administrative hearing officer is dated December 2, 1993, and is unreported. It is reprinted at pages A-43 through A-51 of the appendix to this petition. The appeal of the hearing officer's decision was heard by the Indiana Board of Special Education Appeals and their decision was rendered on April 7, 1994. The Board's decision was unreported, and is reprinted on pages A-52 through A-57 of the appendix to this petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATEMENT OF THE GROUNDS OF JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit is dated April 12, 1996. The United States Court of Appeals for the Seventh Circuit Order denying Rehearing is dated May 28, 1996. The jurisdiction of this Court is invoked under 28 U.S.C.§§ 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

United States Constitution, Amendment I

Federal Statutes

20 USC §§ 1400 et seq, Individuals with Disabilities Education Act

Code of Federal Regulations

Education Division General Administrative Regulations ("EDGAR") 34 CFR §§ 76.650-659

Code of Federal Regulations

IDEA Regulations, 34 CFR §§ 300-403, 450-452, 552

Indiana Statute

Indiana Code §20-1-6-4

STATEMENT OF THE CASE

A. Statutory and Regulatory Scheme

Part B of the Individuals with Disabilities Act (IDEA) 20 U.S.C. §1400 et seq., provides for federal grants to be made through states to local school districts to assist in providing educational services to children with disabilities. Each state which elects to participate in this program must, and Indiana has agreed to, accept the provisions of the Act. 20 U.S.C. §1412; I.C. 20-1-6-4. Regulations adopted pursuant to the IDEA set forth the details of the program, 20 U.S.C. §1417 (2)(b).

1. Individual Entitlement to Benefits Under IDEA

When a state accepts an IDEA Part B grant, it must ensure that a "free appropriate public education" ("FAPE"), which includes special education and related services, is made available by the state or a local school district to meet the identified needs of each disabled child. 20 U.S.C.

§1412(2); 34 C.F.R. §300.121. Therefore, states, or local school districts must develop "individual education plans" ("IEPs") to identify the special education and related services that meet the needs of each child with disabilities. 20 U.S.C. §1412 (4), 1414 (d)(5); 34 C.F.R. 300.341.

2. **Private School Children**

If the state, or local school district, cannot provide the necessary services in a public school, it can place the child in a private school, at public expense, 20 U.S.C. §1413(a)(4)(B); 34 C.F.R. §§300.400-402. If a local school district offers a FAPE to a child and the child's parents nonetheless place the child in a private school, the local school district is not responsible for the cost of the placement. See 34 C.F.R. §300.403; Burlington School Committee v. Dept. of Education, 471 U.S. 359, 359 (1985). The program benefits that are provided to private school children are to be "comparable in quality, scope, and opportunity for participation to the program benefits provided for students enrolled in public schools", 34 C.F.R. §76.654.

3. **Statement of The Facts**

At the time this case arose, K.R. was a six year old kindergarten student who has been identified as multiply handicapped. She has a diagnosis of myelomeningocele, spina bifida and hydrocephalus with a shunt. Her disabilities create difficulties for her in expressive language, motor skills and mobility. She needs considerable assistance with positioning for activities, reaching and grasping, self-help

skills, motor movements, mobility within the classroom, and expressing her learned knowledge. (Finding of Fact 1, Rec. pp. 15-16, Admin. Rec. pp. 98-99; Joint Exhibits 1,3, and 14, Admin. Rec. pp. 127, 161 and 207; Admin. Tr. PP 421,423,430, 434-436,438, 554-555,564-569.)

Prior to attending Anderson Community Schools, K. R. received services at Logan Center in South Bend, and later at Hopewell after the family moved to Anderson. When K.R. was three, she was enrolled in the pre-school program through Anderson Community Schools. When she became old enough for kindergarten, her parents enrolled her at St. Mary's School, a private parochial School. (Admin. Tr. pp. 592-594)

In the spring and summer of 1993 case conference committee meetings were held to address K.R.'s need for kindergarten. The recommended program for K. R. was placement in a regular kindergarten class with related services of speech therapy, occupational therapy, physical therapy, transportation and a full time instructional assistant. (Joint Exhibit 14, Admin. Rec. pp. 207-227; Admin. Tr. pp. 594-597).

Although there existed a recognized need for an instructional assistant, at the case conference meeting held on August 9, 1993, Anderson Community Schools informed K.R.'s parents it would not provide that service for K.R., if she attended St. Mary's School. (Joint Exhibit 14, Admin. Tr. pp. 423, 435-435, 479) One of the duties of the instructional assistant would be to move K.R. around the classroom. (Admin. Tr. pp. 421-422) K.R. does attend St.

Mary's School and K.R.'s mother attends school with her to fulfill the duties of an instructional assistant. Because of the refusal to provide the necessary related service of the instructional assistant, K.R.'s parents requested a due process hearing on August 26, 1993. (Admin. Rec. p. 96, Hrg. Dec., App. p. A-43).

After the denial to provide the instructional assistant by Anderson community Schools on August 3, 1993, the school sent a physical therapist and an occupational therapist, on September 3, 1993, to evaluate physical accessibility at St. Mary's School. (Admin. Rec. pp. 126-128, 443, 458). This was done without notice to K.R.'s parents. (Admin. Rec. p. 447, Admin. Tr. p. 37).

The sole issue for the Administrative hearing was "whether the school corporation should provide an instructional assistant at the private parochial school". (Admin. Rec. p. 96, Hrg. Dec., App. p. A-43). The hearing was held on October 26, 1993, which found that the Anderson Community Schools were not obligated to provide the instructional assistant for K. R. at the private parochial school. (Admin. Rec. pp. 95-106, Hrg. Dec., App. pp. A-43 through A-51).

K. R., by her parents, timely appealed the hearing officer's decision to the Indiana Board of Special Education Appeals; which on April 7, 1994, upheld the decision of the hearing officer. (Admin. Rec. pp. 5-10).

K.R. and her parents timely filed their complaint in the U.S. District Court, Southern District of Indiana on May

6, 1994. The case by agreement, was submitted to the U.S. District Court through briefs, stipulated written evidence, and the record of the administrative hearing, with oral argument heard on April 12, 1995. (Dist. Ct. Op., App. p. A-17)

The district Court entered its opinion on May 25, 1995, which granted the requested relief because the applicable federal regulations require Anderson Community Schools to provide benefits to disabled private school children that are "comparable" to the benefits provided to disabled public school students. (Dist. Ct. Op., App. A-17).

Anderson Community Schools filed its notice of Appeal on June 20, 1995. (Rec. p. 165). Anderson Community Schools disagreed with the Circuit Court decision, by stating that the public school has a choice whether to provide a related service at the private school site, at a public school site, or at a neutral site. Further, in disagreement with the Circuit Court decision, Anderson Community Schools stated that IDEA does not establish an individual entitlement to related services for a student unilaterally placed in a private school by the student's parents.

The Seventh Circuit Court of Appeals heard oral argument on February 22, 1996, and issued its decision on April 12, 1996, overturning the District Court, ruling:

A. IDEA and its regulations do not require a public school to make comparable provision for a disabled student voluntarily attending private school as for disabled public school students.

B. Public schools are given discretion under the law and need only provide voluntarily placed school students a genuine opportunity for eligible participation.

C. Anderson Community Schools afforded K.R. a genuine opportunity for the service of an instructional assistant at a public school, which she declined, and therefore has discharged its obligation under IDEA. (7th Cir. Op., App. p. A-1)

On April 26, 1996, the K.R. timely filed a Petition For Rehearing disagreeing with the court's decision, because:

A. It effectively eliminates the freedom to place K.R. in a school of her parent's choice and receive benefits under IDEA.

B. It effectively eliminates K.R.'s entitlement for special education and related service, because her parents have chosen to place her in a private school.

C. It redefines "comparable benefits" to be provided privately placed school children by making provision at a public school all that is required under IDEA.

The Seventh Circuit Court of Appeals denied the Petition for Rehearing on May 28, 1996. (App. pp. A-14 through A-15) K.R. petitions this Court for writ of certiorari.

BASIS OF FEDERAL JURISDICTION

20 U.S.C. §1415 (E) (2) Judicial Review and resolution of Individuals with Disabilities Education Act (IDEA) dispute.

42 U.S.C. §1983 Protecting citizens against state or local action depriving them of rights secured by the Constitution and Federal statutes.

ARGUMENT

I. WHETHER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA), AND ITS ACCOMPANYING REGULATIONS, REQUIRES ANDERSON COMMUNITY SCHOOL CORPORATION TO PROVIDE K.R., A CHILD WITH DISABILITIES AS DEFINED IN IDEA, AN INSTRUCTIONAL ASSISTANT ON SITE AT A PRIVATE PAROCHIAL SCHOOL WHERE K.R.'S PARENTS HAVE VOLUNTARILY CHOSEN TO ENROLL HER.

It is important for the Supreme Court to grant certiorari in this case, because the Court of Appeals for the Seventh Circuit has decided a federal question in a way that conflicts with applicable decisions of this Court, and the Court of Appeals for the Second Circuit. See Rule 10, Rules of the United States Supreme Court.

A. The Court of Appeals decision conflicts with the holding of the Supreme Court in Zobrest v. Catalina Foothills School District, 113 S.Ct. 2462 (U.S. 1993). In Zobrest the United States Supreme Court has determined that there is choice for such privately placed students as K.R. The case dealt with need for the service of an interepreter for a deaf child at a private school. The Court stated in Zobrest, at 2467:

> "The service at issue in this case is part of a general government program that distributes

> benefits neutrally to any child qualifying as "handicapped" under the IDEA, without regard to the 'sectarian-nonsectarian, or public- non public nature' of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents".

The issue of choice as provided under IDEA to parents has been decided by Zobrest and the decision by the Court of Appeals is now in conflict with that determination. It should also be noted that Zobrest is a later decision than the Goodall v. Stafford County Schl. Bd., 930 F.2d 363 (4th Cir.1991) decision, on which the Court of Appeals relied. The decision rendered by the Court of Appeals, by deciding to agree with the Fourth Circuit in Goodall, has reached the conclusion that the essential component of this service to be provided is merely that of opportunity. (7th Cir Dec., App. pp. A-1 through A-13.) The most crushing portion of this decision is the flawed reasoning that where the public school makes available necessary service at a public school, in this case Anderson Community Schools, which gives the disabled student a genuine opportunity to participate, the public school has discharged its obligation. (7th Cir. Dec., App. pp. A-1 through A-13) The Court of Appeals then reasons that because K.R. was not prevented from attending the public school by anything other than a desire to attend private school, she was provided with a genuine opportunity which she rejected. (7th Cir. Dec., App. pp. A-1 through A-13) This

reasoning is in conflict with the provision of the Act, as set forth above, which provides choice to parents to place their children at public or private school. If the very most important service needed by K.R., in order for her to facilitate her educational development, can only be received if she attends Anderson Public Schools, then what is her choice with regard to being able to attend private school? The reality is she has no choice. In formulating its decision, the Court of Appeals failed in analyzing three distinct areas of the IDEA.

The strongest driving force in the decision of the Court of Appeals in K.R. was the Court's characterization that the language in the statute, particularly 20 U.S.C.§ 1413(a)(4)(A) was limiting as to what necessary services disabled children are entitled to, in order to meet their unique needs, when parents voluntarily enroll them in a private school. The Court emphasized that this statute calls for providing something different.

20 U.S.C. §1413(a)(4)(A) provides that, "to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services..."

The Court of Appeals decision, however, fails to provide any authority for the alleged limitation it characterizes as so implicit in 20 U.S.C.§1413(a)(4)(A).

The IDEA is an Act that has been complicated over the years by educated people, when in fact, the IDEA and Code of Federal Regulations implementing the IDEA have provided an orderly process in the administration of a program that was developed in 1966. (Although the U.S.Department of Education's Office of Special Education Programs (OSEP) claims its interpretation goes back to 1977, such cannot be tracked back to 1977)

In reviewing the K.R. Court of Appeals decision and the Court's application of limitations on the statute 20 U.S.C. §(1413(a)(4)(A), their analysis is not consistent with the OSEP interpretation upon which the Court placed deference.

At the outset certain other differences should be distinguished. First, local school boards have a wide discretion in designing and developing their special education programs. 34 C.F.R.§76.652. K.R. seeks only the provision of an instructional assistant at her private school.

With that in mind, it is necessary that the statute at issue be reviewed. Under the decision by the Court of Appeals, the Department of Education's interpretation, which it adopted in its opinion, is that 20 U.S.C.§1413(a)(4)(A) is intended to be a lesser entitlement/requirement for children voluntarily enrolled in private schools as opposed to those disabled children enrolled in public schools and those students publicly placed or referred to a private school by a public agency (publicly placed).

This however, is not the interpretation that should be given 20 U.S.C.§1413(a)(4)(A). At page 9 of the Department of Education's Amicus Brief in K.R., the Department states:

> The Statute: The Secretary's construction of the applicable provision of the IDEA is reasonable. Under 20 U.S.C.§1413(a)(4)(A), as to children who are voluntarily enrolled in private schools, the statute requires only that "provision [be] made for the participation of such children" in the special education program. That is, the statute only requires the states to make some special education services available to children in private schools. It does not require that they provide all of the needs of all of these children. Moreover, the services provided need only be "consistent with the number and location of children with disabilities in the State" who are enrolled in private schools **thus imposing an obligation only to distribute the funds that the state receives among the local school districts in proportion to the number of disabled children in each district.** (Emphasis Supplied)

This language set forth by the Department of Education, clearly reveals no limiting authority as the decision of the Court of Appeals attempts to read into the statute, at the insistence of OSEP, limiting the entitlement of qualifying as disabled under the IDEA. It is the number of identified IDEA children in the state listed on the SEA application that determines the funding amount that the Department will provide to the State. In turn, these numbers are provided by

the various districts within the State seeking funds through their LEA subgrant application to the State. It is the total "child count" which determines the amount of money an LEA will receive to implement its IDEA program.

For example, if the plan submitted by the local agency identifies one hundred (100) school children in its jurisdiction of which ninety (90) are enrolled in public schools and ten (10) are enrolled in private schools and all are qualified as disabled under the IDEA to receive services, and that district is entitled to receive $320.00 per child in formula money from the State per identified and counted child, then the state must distribute $320.00 for each of the ninety (90) qualified public school children and $320.00 for each of the ten (10)private school children.

With due respect to the decision of the Court of Appeals, there is nothing in the statute or regulations which supports the supposition that 20 U.S.C.§1413 (a)(4)(A) limits the provisions of services to any sub-class of disabled children qualified under the IDEA. The very intent of Congress was to ensure inclusion, not exclusion of voluntarily enrolled qualified disabled children in private schools under the IDEA. It is beyond logic to assume that an Act of Congress intending to grant legal/statutory rights upon all qualified disabled children, under such a powerful act as the IDEA, would incorporate a gaping loophole that would allow denial derived from discretion over the individual statutory rights and needs of a qualified handicapped child, just because that child's parents select a parochial school for that child's general education.

While the Court of Appeals decision briefly cites Goodall, the Letter to Goodall, 16 EHLR 1398 (1990) which is also cited in the Fourth Circuit opinion is often referred to by OSEP. In Letter to Goodall, the Director of the Office of Special Education, Dr. Judy Schragg stated:

> SEAs [State educational agencies] and LEAs do not necessarily have to provide services on the premises of private schools in order to meet their obligations under 20 U.S.C. §1413(a)(4)(A). Rather department regulations provide that students with handicaps enrolled in private schools must be provided by SEAs and LEAs "with a genuine opportunity for equitable participation" in the special education carried out by these agencies. The Department has long held that it is possible for SEAs and LEAs to provide students with handicaps enrolled in private schools with a genuine opportunity for equitable participation by serving them at a public school or neutral site. **Whether an LEA would have to provide on-site services to meet the "equitable" participation requirement would depend on the specific facts respecting each of the students with handicaps enrolled in private schools within its jurisdiction to whom it is providing services.** (Emphasis Supplied)

This interpretation of the statute evidences the principle that discretion as to whether an LEA will serve a qualified disabled child "on-site" at the private school depends upon the facts and "needs" of the child and does not

support a denial based upon mere enrollment of the child at a private school.

Dr. Schragg has further noted that under Part B, FAPE, among other elements, includes the provisions of special education and related services at no cost to parents in conformity with the child's IEP. Despite Dr. Schragg's language, the OSEP pronouncements set forth ambiguous phrases, such as:

> "...a school district's obligations to children with disabilities enrolled in private schools by their parents are not the same as the school district's obligations to publicly-placed children with disabilities."

Despite its ambiguity, this phrase is correct. The obligations which a school district has to those disabled children the district places in private schools (publicly-placed children with disabilities) is set out in 34C.F.R.300.401. Among the elements of FAPE in 300.401, the district must insure the provision of a general education (i.e., A,B,C's), pay for tuition, monitor the publicly-placed child's IEP, provide services at a school facility which meets the standards of the SEA, and all other rights which a child with a disability has when enrolled in a public school served by a public agency, and all at no cost to the parents. 20 U.S.C.§1413(a)(4)(B). On the other hand, the obligations owed to a qualified disabled child under the IDEA voluntarily enrolled in private school is limited and such limits are recognized by the Secretary in 34 C.F.R. 300.403(a). The district is not required to provide that

element of FAPE recognized as containing the child's education (i.e. general education). However, it shall make services available to the child. Nowhere in the Act does the statutory language state that only "some" qualified disabled children under the IDEA voluntarily enrolled in private school will be provided "some" services necessary to meet that child's unique needs. Further, OSEP has stated:

> A public agency, however, may elect not to serve every parentally placed child residing in its jurisdiction. In addition, a public agency is not required to make the full range of Part B services available to those parentally-placed children with disabilities in private schools whom it has elected to serve. Determinations of whether a parentally-placed child in a private school should receive Part B services from a public agency, and the nature and extent of such services, must be made by the public agency responsible for educating that child. See Letter to Moore, 20 IDELR 1213, at 1214(1993)

This language was also foundational in the decision of the Court of Appeals. It should be noted that it is correct that a public agency may elect not to serve every parentally-placed child residing in its jurisdiction and that not all handicapped children are required to be served; these obligations differ only because some handicaps do not meet the definition or criteria, and severity to become statutorily protected under the IDEA.

B. The Court of Appeals decision has eliminated K.R.'s entitlement to services, because she is enrolled in a private school by choice of her parents. This is in conflict with the Decision of the United State Supreme Court in Board of Kiryas Joel Village School District v. District of Grumet, 114 S.Ct. 2481 (1994), which at 2485 states:

> "These schools do not however, offer any distinctive services to handicapped children, who are entitled to special education services even when enrolled in private schools."

The decision of the Court of Appeals states that Congress intended to give disabled students voluntarily attending private school a lesser entitlement (7th Cir. Dec., App. pp. A-1 through A-13) The decision then goes on to say that the regulation under IDEA in no way undermines the conclusion that public schools need not provide comparable benefits to students who are voluntarily attending private school in every instance. (7th Cir. Dec. App. pp. A-1 through A-13) The Court of Appeals further tracks what it believes are three categories of students, and that 34 C.F.R. §300.403(a), which states the public schools need not pay for the child's education shows that private school children are not to receive the same benefits as public school children. (7th Cir. Dec. App. pp. A-1 through A-13) While §300.403(a) does not require that the public school will pay the child's tuiton for basic education at the private school, it does require that special education and related services are to be provided. Petitioners submit that through the process of consultation with representatives of private schools, by the LEA, in

locating potentially qualified disabled children in private schools, that those suspected children must be evaluated as required under the regulation 34 C.F.R.§ 300.128. Further, once qualified as disabled under the IDEA, those children, whether enrolled in a public or private school are statutorily protected and entitled to services to meet their unique needs. Kiryas Joel v. Grumet, 114 S.Ct.2481(1994). See also, Felter v. Cape Girardeau School District, 830 F. Supp. 1279(E.D.Mo.1993). Furthermore, the history of the statutes and regulations clearly indicate that the decision of the Court of Appeals is also flawed as a result of misguidance given the Court by OSEP, concerning OSEP's alleged long standing policy statements on this issue. With due respect to the Anderson Community Schools, which also relies on these OSEP policy statements, and to the Court of Appeals, the illogic of OSEP and the Court of Appeals' arguments is the fact that it requires that limiting words be read into the governing statute, words which, very simply, are not there. The "consistent with" language was actually drafted in 1966 as part of the very first federal program offering financial assistance for state-run special education programs for children with disabilities. See Elementary and Secondary Education Amendments of 1966, Pub.Law No. 89-750, §161,80 Stat. 1191, 1206(1966)(creating U.S.C. §604). It has been a vital part of the statute which became the IDEA ever since. The "all children" language was not drafted until 1975, almost a decade later. See Education for All Handicapped Children Act of 1975, Pub. Law No. 94-142, §612,89 Stat. 773, 780 (1975).

20 U.S.C.§1413(a)(4)(A) of the governing statute plainly states that "provision" must be made for the

"participation" of children, such as in the special education programs of the Anderson Community Schools and the plan of the State of Indiana. Any other interpretation flies in the face of the statutory language and the Congressional intent of the statute.

More important, however, is the fact that 20 U.S.C. §1413(a)(4)(A) specifies both the scope of its command and the manner in which the "participation" of private school children must be achieved. The statute does not state that such children are to be served "to the extent consistent with the School's budget," and it most certainly does not state that they are to be served "to the extent that the School Board 'elects' to serve them".

C. The decision of the Court of Appeals changes the definition of "comparable benefits" to be provided privately placed disabled school children, and in doing so is in conflict with Wheeler v. Barrera, 417 U.S. 402, 94 S.Ct. 247 (1974). The Court of Appeals states at pages 10 and 11 of its decision:

> "Where the public school makes available the necessary service as a public institution, giving the disabled student a genuine opportunity to participate, and nothing in the record indicates that it has otherwise abused its discretion, the public school has discharged its obligation."

The Court of Appeals is quoting from Goodall, Supra. at 368-369. In Wheeler, the U.S. Supreme Court construed Title One of the Elementary and Secondary Education Act of

1965 and its regulations. The language of this statute and its regulations is virtually identical with that of the IDEA, its regulations and EDGAR (Education Department General Administrative Regulations). The ESEA regulations state:

> The needs of educationally deprived children enrolled in private schools, the number of such children who will participate in the program and the types of special educational services to be provided for them, shall be determined, after consultation with persons knowledgeable of the needs of these private school children, on a basis comparable to that used in providing for the participation in the program by educationally deprived children enrolled in public schools. 45 CFR §116.19(b).

In comparison, the EDGAR regulations state:

> Comparable benefits. The program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools. 34 CFR 76.654(a).

Because the language of Title I is so similar to the language which Congress subsequently used in the IDEA, and because the Title I regulations essentially became the EDGAR regulations affecting all the subsequently adopted education

titles (including IDEA), the Supreme Court's construction of Title I and its regulations shows conclusively how the Supreme Court would interpret IDEA and its regulations.

In Wheeler, parents of parochial school students in Kansas City, Missouri, brought a class action against the public school system alleging that the public system had received Title I (remedial education) money and spent it to provide remedial education teachers in public schools, but not in private schools. Therefore, the private school students were not receiving a comparable benefit as required by the act. The Supreme Court ruled in favor of the parents, finding:

1. It was not comparable to give materials and equipment both in public and private schools, to give teachers in public schools, and nothing more for private school children. The mere offer to let private school children come to the public school system to receive the benefit Congress intended, did not comply with the statute's mandate. Wheeler Id. at 422-425.

If public schools merely have to make the services available at the public school, the regulations pertaining to private school students serve no purpose, for K.R. would no longer be a private school student if she attended ACS.

The District Court thoroughly discussed 34 C.F.R. §76.654(a) dealing with comparable benefits, and its application in this case, (Dist. Ct. Op. App. pp. A-23 to A-31).In so doing, the District Court discussed among other cases Goodall, where the parents of a hearing impaired child

wanted a public school system to provide a cued speech interpreter at the private school where they had chosen to place the child. (Dist. Ct. Op. App. p.A-25). The District Court further found that the Goodall determination of 34 C.F.R. §76.532 would not undermine the rights granted to private school students under 34 C.F.R. 76.654(a) after the decision by the Supreme Court in Zobrest. (Dist. Ct. Op. p.A-29) The best reasoning on the meaning of "comparable benefits" is still that of Judge Hamilton of the District Court, that, "No benefits are not the "comparable" benefits required by §76.654(a)". (Dist. Ct. Op. App. p.A-26) Petitioners submit that the Court of Appeals definition of "comparable benefits" is directly in conflict with the decision in Wheeler.

The Court of Appeals ignored Wheeler. If it is no longer good or applicable law, that should come from a clear ruling by the Supreme Court; not the failure of the Court of Appeals to apply it in a case in which it is plainly applicable, if it is valid law.

D. The decision of the Court of Appeals for the Seventh Circuit is now in conflict with a decision of the Court of Appeals for the Second Circuit. In Russman by Russman v. Bd. of Education of the Enlarged City School Dist. of Watervliet, 85 F.3d 1050 (1996), the Court of Appeals for the Second Circuit, on June 12, 1996, decided a case very similar to the instant case, and disagreed with the interpretation of IDEA made by the Court of Appeals for the Seventh Circuit. The case, in addition to a teaching aide, also called for a consultant teacher to work with the regular classroom teacher to modify the academic curriculum for the disabled child. Id. at 1052. The Russman Court states its

disagreement with the Court for the Seventh Circuit by saying on page 1056:

> "Although Anderson is somewhat more persuasive, it nevertheless accorded excessive discretion to school authorities to deny the on-site provision of services to disabled students in private schools. Anderson relied principally on the different statutory and regulatory language used with regard to disabled students attending public schools and those voluntarily placed in private schools. Based on these differences, it concluded that there was "little doubt that...Congress intended to give disabled students voluntarily attending private school a lesser entitlement," 81 F.36 at 678....
>
> However, nothing in the quoted language suggests, that where a private school is attended by five disabled children and the cost per student of providing an occupational therapist at the private or public school is identical, school authorities may limit such services to the public school. Nor does the language suggest that an individually tailored service may be offered only at a public school....
>
> We do not, therefore, agree with Anderson's vesting of school authorities with broad discretion to deny on-site individualized services to private school students. Indeed, apart from the limiting language

> discussed above, the statute and regulations are more consistent with mandatory entitlements than with discretionary authority."

Russman further states:

> "Moreover, if services required by the IDEA need be provided only in public schools even absent fiscal concerns, then private school students are entitled under the IDEA to little more than after-school services....If public school authorities may freely refuse to provide such benefits at private schools, therefore, disabled students must either forego the IDEA benefits, bear their cost, or transfer to the public schools. This result, however, seems to be precisely what the statute and regulations seek to preclude." Id. at 1057.

Petitioners submit that Russman is the correct reading of the statutes and regulations under the IDEA. Further, two district courts have held that the IDEA requires the provision of on-site benefits to handicapped children at non-public schools. See Cefalu v. East Baton Rouge Parish Sch. Bd., 907 F.Supp. 966 (M.D.LA.1995), which held that IDEA requires the school district to provide a signlanguage interpreter for a deaf student at a parochial school; Fowler v. Unified Sch. Dist. No. 259, 900 F.Supp. 1540 (D.Kan.1995), which held that IDEA requires the school district to provide

interpretive services for a deaf child at a private, non-sectarian school.

The above mentioned cases further emphasize the need for the Court to grant certiorari, as they illustrate the split of authority in interpreting the IDEA, and its regulations, in the different Districts.

II. WHETHER THE ANDERSON COMMUNITY SCHOOL CORPORATION'S CONDUCT, OF REFUSING TO PROVIDE THE NECESSARY INSTRUCTIONAL ASSISTANT TO K.R. AT THE PRIVATE PAROCHIAL SCHOOL, VIOLATES THE NEUTRALITY PRINCIPLE OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

It is important that the Supreme Court grant certiorari in this case, because the decision of the Court of Appeals for the Seventh Circuit denying the requested instructional aid in the parochial school violates the neutrality principle consistently found by the United States Supreme Court to be inherent in the establishment clause of the First Amendment to the United States Constitution.

The establishment clause of the First Amendment to the United States Constitution has long been held to require the government to maintain a posture of strict neutrality in the manner it deals with the religious beliefs of its citizens Everson v. Bd. of Educ., 330 U.S. 1, 91 L.Ed. 2d. 711 (1946) The decision by the Court of Appeals for the Seventh Circuit enables a governmental entity, Respondent Anderson Community School Corporation, to maintain a hostile position that places a heavy burden on Petitioner's freedom

to place their child in a parochial school due to their sincerely held religious beliefs, in violation of the establishment clause.

Respondent acknowledges that they would freely agree to provide an instructional aid to Petitioner were she to attend their public school; yet they refuse to do so if she attends a parochial school. Due to Petitioner's numerous and severe physical problems, an instructional aid is absolutely necessary for her to be able to attend any school, public or private. In fact, throughout the administrative proceedings and most of the litigation below in this case, K.R.'s mother has accompanied her daughter to school and served as her instructional aid; obviously a substantial burden on her daily activities. The parent's only other options are to hire an instructional aid themselves, which would of course present a great financial burden to the parents, or surrender their right to direct the education of their child in accordance with their religious beliefs, which would deny them their rights under the United States Constitution. A posture of neutrality on Respondent's part, as required by the Establishment Clause, would prohibit them from placing such burdens on K.R.'s educational choices. This Court has held:

> ...the First Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them. Everson v. Bd. of Educ., Id. at 724.

The Supreme Court has continued to uphold this principle in several other decisions:

We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse. Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 114 S. Ct. 2481, 2491, 129 L.Ed. 2d 546 (1994)

We have time again held that the government generally may not treat people differently based on the God or gods they worship, or don't worship." Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 114 S. Ct. 2481, 2497, 129 L. Ed. 2d 546, (1994)

The attitude of government toward religion must, as this court has frequently observed, be one of neutrality...it requires that "government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and non-religion, and that it work deterrence of no religious belief. Board of Education v. Allen, 392 U.S. 2236, 249, 20 L. Ed. 2d 1060, 1069, 88 S. Ct. 1923 (1968)

[When the government] conveys a message of government enforcement or disapproval of a religion, the core purpose of the establishment clause is violated. Grand Rapids School District v. Ball, 473 U. S.

373, 389, 87 L. Ed. 2d 267, 105 S. Ct. 3216 (1975)

The requirement of neutrality toward religious practices was reaffirmed by this Court in the recent case of Rosenberger v. Rector and Visitors of the University of Virginia, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995). As this Court held in that case:

> We have held that the guarantee of neutrality [toward religion] is respected, not offended, when the government, following neutral criteria and even-handed policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse. Id at 2521

> Through our Establishment Clause jurisprudence is in hopeless disarray, this case provides an opportunity to reaffirm one basic principle that has enjoyed an uncharacteristic degree of consensus: The Clause does not compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants. Id at 2532

As stated above, Anderson Community School Corporation refuses to provide an instructional aid to K. R. at the parochial school, yet acknowledges that it would freely provide the aid on the grounds of the public school. Instructional aids are commonly provided at sites outside public schools, for example in hospitals, corrections facilities, and indeed, in certain private schools. Their

refusal to provide the instructional aid at this particular school evidences hostility and bias toward parochial schools that is in clear violation of the neutrality required on the part of government by the Establishment Clause of the First Amendment. The decision by the Court of Appeals in reversing the District Court's order to the school to provide the requested aid, does not agree with this Court's numerous and consistent rulings enforcing the protections inherent in the Establishment Clause of the First Amendment. As such, that decision should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 95-2497

K.R., an infant, by her parents and next friends M.R. and K.R.R., and M.R. and K.R.R.,

Plaintiffs-Appellees,

v.

ANDERSON COMMUNITY SCHOOL CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 94 C 766—David F. Hamilton, *Judge.*

ARGUED FEBRUARY 22, 1996—DECIDED APRIL 12, 1996

Before CUMMINGS, EASTERBROOK and DIANE P. WOOD, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* K.R. is a multiply handicapped student in need of a full-time instructional assistant to attend school. If K.R. attended public school, she would indisputably be entitled to all services prescribed by her individual education plan ("IEP") under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq. ("IDEA"), including the instructional assistant. However, K.R.'s parents have opted out of the public system and have voluntarily placed K.R. in a private parochial school. The question, therefore, is whether the IDEA or its accompanying regulations require Anderson Community Schools

to provide the instructional assistant at the private school. The district court held that the public school was obligated to provide the service and issued a permanent injunction and declaratory judgment in favor of K.R. Because the IDEA and its regulations do not entitle K.R. to the full range of services at a private school, but rather give the public school discretion in cases such as this, we now reverse.

I.

It is not disputed that K.R. is a child with disabilities who is eligible under the IDEA for special educational and related services. K.R. was a six-year-old kindergarten student at the time this dispute arose. She suffers from myelomeningocele, spina bifida, and hydrocephalus with a shunt, which create difficulties with expressive language, motor skills, and mobility, requiring her to use a wheelchair. She thus needs assistance with positioning for activities, reaching and grasping, self-help skills, motor movements, mobility, and expression. Implementation of her IEP (determined in conformity with the IDEA) requires, among other necessary related services, a full-time instructional assistant.

K.R. received services from community agencies prior to attending public school at Anderson Community Schools. At age three, K.R. was enrolled in the pre-school program at the public school where she received various services related to her disabilities. In the spring and summer of 1993, case conference meetings were held to work out K.R.'s IEP for the 1993-1994 school year in anticipation of her continued attendance at public school. The IEP provided for placement in a kindergarten class with related services for speech therapy, occupational therapy, transportation, and a full-time instructional assistant. During the conference, K.R.'s parents asked whether K.R. would receive all of the services if she attended St. Mary's School, a private parochial school. The public school told K.R.'s parents that it would not provide an instructional

assistant if she attended private school. Nonetheless, K.R.'s parents voluntarily enrolled her at St. Mary's for kindergarten. During K.R.'s attendance at St. Mary's, the public school has provided K.R. with speech therapy, occupational therapy, and physical therapy at a public school site, as well as transportation to that site. Since the local system determined that it would not provide K.R. with an instructional assistant on site at the private school, and since St. Mary's chose not to provide the service itself, K.R.'s mother attended St. Mary's with her to fulfill the duties of an instructional assistant prior to the district court's decision.

K.R.'s parents requested a due process hearing, which was held on October 26, 1993. The hearing officer concluded that the public school is not obligated to provide an instructional assistant at the private school. The Indiana Board of Special Education Appeals upheld the decision on April 7, 1994. Having exhausted their administrative remedies, K.R. and her parents filed a complaint in the district court. On May 25, 1995, the district court issued a permanent injunction and declaratory judgment holding that the public school was required to provide a full-time instructional assistant at the private school. *K.R.* ex rel. *M.R. v. Anderson Community Sch. Corp*, 887 F. Supp. 1217 (S.D. Ind. 1995). The district court based its decision on a regulation that requires the special education services to private school students be "comparable" to the services provided to public school students.

II.

The IDEA's statutory scheme is typical of a federal granting program. The statute provides federal grants to states, which in turn fund local school districts, for assistance in educating disabled students. The states that elect to participate in the program receive a grant of not more than forty percent of the average per pupil expenditure for all students nationwide multiplied by the number of disabled students in the particular state receiving the

grant. 20 U.S.C. § 1411(a). According to the United States Department of Education ("DOE"), federal grants supply only about eight percent of the funds needed to provide disabled students with special services. Nonetheless, a state that accepts IDEA grants must have in effect a policy that "assures all children with disabilities the right to a free appropriate public education" and a plan that assures such an education will be available. 20 U.S.C. § 1412(1) & (2)(B). The local school district must prepare for each disabled child an IEP that identifies the special education and related services that are necessary to meet that child's needs, and the district must then offer to provide those services at full public expense. 20 U.S.C. §§ 1412(4), 1414(a)(5). The district must place the child in a private school at public expense if it is unable to provide the necessary services in a public school. 20 U.S.C. § 1413(a)(4)(B).

The statute and accompanying regulations then specifically address the situation where parents voluntarily place their child in a private school. The statute requires that each state's plan

> set forth policies and procedures to assure—
>
> (A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services . . . .

20 U.S.C. § 1413(a)(4). The regulations help clarify the public school's obligation with respect to disabled students in private schools. If the parents voluntarily place their child in a private school, "the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§300.450-300.452." 34 C.F.R. § 300.403. In turn, Section

grant. 20 U.S.C. § 1411(a). According to the United States Department of Education ("DOE"), federal grants supply only about eight percent of the funds needed to provide disabled students with special services. Nonetheless, a state that accepts IDEA grants must have in effect a policy that "assures all children with disabilities the right to a free appropriate public education" and a plan that assures such an education will be available. 20 U.S.C. § 1412(1) & (2)(B). The local school district must prepare for each disabled child an IEP that identifies the special education and related services that are necessary to meet that child's needs, and the district must then offer to provide those services at full public expense. 20 U.S.C. §§ 1412(4), 1414(a)(5). The district must place the child in a private school at public expense if it is unable to provide the necessary services in a public school. 20 U.S.C. § 1413(a)(4)(B).

The statute and accompanying regulations then specifically address the situation where parents voluntarily place their child in a private school. The statute requires that each state's plan

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> (A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services . . . .

20 U.S.C. § 1413(a)(4). The regulations help clarify the public school's obligation with respect to disabled students in private schools. If the parents voluntarily place their child in a private school, "the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§300.450-300.452." 34 C.F.R. § 300.403. In turn, Section

300.452 states, "[e]ach [local educational agency] shall provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the agency." 34 C.F.R. § 300.452. Section 300.451 further requires the local agency to ensure that, "[t]o the extent consistent with their number and location in the State, provision is made for the participation of private school children with disabilities in the program assisted or carried out under this part by providing them with special education and related services . . . ." 34 C.F.R. § 300.451.

Section 300.451 also requires the local agency to meet the requirements of 34 C.F.R. §§ 76.651-76.662 (we will call this series of regulations the "cross-referenced" regulations). 34 C.F.R. § 300.451(b). These cross-referenced regulations address conditions that the state and the subgrantees (local public schools) must meet regarding students in private schools, and they form the basis of the district court's opinion. Under these regulations, the local agency "shall provide students enrolled in private schools with a genuine opportunity for equitable participation" and do so "in a manner that is consistent with the number of eligible private school students and their needs." 34 C.F.R. § 76.651(a)(1) & (2). It shall consult with students' representatives regarding which children will receive benefits, what benefits they will receive, how the children's needs will be identified, and how the benefits will be provided. 34 C.F.R. § 76.652(a). Further, the local agency shall determine the following "on a basis comparable to that used" for public school students:

> (a) The needs of students enrolled in private schools.
>
> (b) The number of those students who will participate in a project.
>
> (c) The benefits that the [agency] will provide under the program to those students.

34 C.F.R. § 76.653. Finally, at least for our purposes, "[t]he program benefits that [an agency] provides for students enrolled in private schools must be comparable in

quality, scope, and opportunity for participation to the program benefits that the [agency] provides for students enrolled in public schools." 34 C.F.R. § 76.654(a).

III.

The district court rested its decision entirely on what it called the "plain language" of Section 76.654(a) that requires "comparable" benefits. 887 F. Supp. at 1223. Because K.R. would receive an instructional assistant in the public school, the court concluded that she was entitled to a comparable benefit in the private school. The district court stated that "comparable" did not mean "identical"—the only limitation on "comparable" that it acknowledged—but concluded that a full-time instructional assistant was the only comparable alternative. *Id.* at 1225. The court's analysis is problematic because it focused only on one section of a rather complex set of statutory and regulatory provisions. And not insignificantly, the district court's conclusion contradicts the conventional understanding of the IDEA, including the DOE's understanding.

Setting the regulations to one side, the statutory provisions make clear that Congress did not intend public schools to provide disabled students who are voluntarily placed in private schools with benefits comparable to those of disabled public school students in all instances. The IDEA refers to three categories of disabled students: those attending public school, those placed in private school by the local school district, and those attending private school voluntarily. For students attending public school, the statute requires in no uncertain terms that *all* children with disabilities receive a free appropriate public education that covers the expense of *all* special education and related services. 20 U.S.C. §§ 1412(1) & (2)(B), 1412(4), 1414(a)(5). In stark contrast is the provision governing students voluntarily placed in private school. It requires only that "provision is made for the participation of such children" in the local IDEA program, and even at that, only "to the extent consistent with the number

and location of children with disabilities" enrolled in private schools. 20 U.S.C. § 1413(a)(4)(A). And if any doubt is left that Congress intended a lesser requirement in Section 1413(a)(4)(A) for children voluntarily placed in private school, the very next subsection mandates that children placed in private school *by the local school district* receive the same benefits as children attending public school. 20 U.S.C. § 1413(a)(4)(B). Thus Congress not only differentiated between public and private schools, but also between children voluntarily attending private school and children placed in private school by the local school district. The statute leaves little doubt that, of the three groups, Congress intended to give disabled students voluntarily attending private school a lesser entitlement.

The regulations adopted under the IDEA in no way undermine the conclusion that public schools need not provide comparable benefits to students voluntarily attending private school in every instance. They in fact demonstrate that when dealing with such students, the public school has discretion over what services to provide. The regulations track the statute in differentiating the three categories of disabled students. Thus they require that all children with disabilities receive a free appropriate public education, 34 C.F.R. §§ 300.121 & 300.126, but separately address the requirements for disabled children placed in, or voluntarily attending, private school. 34 C.F.R. §§ 300.400-300.487. Children placed in private school by the local school district have "all of the rights of a child with a disability who is served by a public agency." 34 C.F.R. § 300.401(b). However, children voluntarily attending private school are governed by different regulations—regulations which state that the public school need not pay for the child's education, 34 C.F.R. § 300.403(a), and that provision must be made for participation in special education and related services, but only to the extent consistent with the number of disabled private school children in the State. 34 C.F.R. § 300.451(a).

It is abundantly clear from the distinctions drawn in both the statute and the regulations that neither Congress

nor the DOE intended for public schools to provide students such as K.R. with services comparable to what she would receive in the public school. If Congress or the DOE had so intended, there would have been no need to draft separate provisions for the three categories of students referenced by the drafters. In light of all this, one would not expect to find that the cross-referenced regulations, 34 C.F.R. §§ 76.651-76.662, altered the clear statutory and regulatory scheme. Indeed, those regulations make clear that the public school has a great deal of discretion in providing benefits to disabled private school students. The public school need only provide "a genuine opportunity for equitable participation," 34 C.F.R. § 76.651(a)(1), and it must consult with representatives of the student to determine, among other things, *which* children will receive benefits and *what* benefits will be provided. 34 C.F.R. § 76.652(a)(1) & (3). The consultation mandated under Section 76.652 is entirely separate from the consultation required to formulate the IEP.

Only Section 76.654(a), relied upon by the district court, lends support to the notion that disabled students voluntarily attending private school must be treated the same as public school students. It states that the "program benefits that [an agency] provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the [agency] provides for students enrolled in public schools." 34 C.F.R. § 76.654(a). But read in light of the statutory scheme outlined above and the other regulations, which precisely track the statutory division of public and private school students, the only reasonable interpretation of Section 76.654(a) is that the comparability requirement is limited to the "program benefits that [an agency] provides." Sections 76.651 and 76.652 explicitly give the public school discretion over what benefits to provide; however, when benefits are provided, Section 76.654 requires that they be comparable to benefits for public school students. Section 76.654 is not by its terms a mandate that private school students shall receive full benefits.

Our interpretation of Section 76.654 is guided not only by the text, it is also supported by separation-of-powers principles. An agency does not have authority to invade the province of the legislature by promulgating regulations that contravene the governing statute—in other words, to make law. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-214. Thus regulations that are inconsistent with the statute are void. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26; *United States v. Larionoff*, 431 U.S. 864, 873. Given the statutory scheme as outlined above, which clearly affords public schools discretion in providing services to private school students, interpreting "comparable" in Section 76.654 as requiring identical services would render that regulation void as inconsistent with the statute. The district court arguably did not go quite so far, but its determination that a full-time instructional assistant was the only "comparable" alternative (which just happened to be identical to what K.R. would receive at the public school) failed to take into account the discretion afforded public schools in deciding which services to provide. For example, public schools may legitimately regulate the provision of expensive services, such as full-time assistants, in order to ration limited resources across more students. In light of the statutory provisions, "comparable" must be interpreted in a manner that permits public schools discretion in providing services to voluntarily placed private school students.

The district court's interpretation of Section 76.654 is further contradicted by the conventional understanding of the IDEA and its regulations. See *Goodall* ex rel. *Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363 (4th Cir. 1991), certiorari denied, 502 U.S. 864. The DOE has consistently interpreted the regulations as giving public schools discretion in providing benefits to students voluntarily attending private school. 45 Fed. Reg. 22570 (1980) (stating that public school need only offer a genuine opportunity for equitable participation, and that what constitutes "genuine opportunity" will "vary widely, depending on local circumstances"); 49 Fed. Reg. 48522 (1984) (interpreting

statute as providing public schools "with the discretion to devise . . . the most efficient scheme possible for providing adequate special education and related services to a number of, but not necessarily all, private school handicapped children"—an interpretation that "has been consistently followed by the Department"); 16 Educ. For Handicapped L. Rep. 1398-1400 (1990) (response letter stating that whether or not public school needs to provide on-site services at private school depends on the specific facts of each case); 20 Individuals With Disabilities Educ. L. Rep. 1440 (1994) (agency memorandum stating that private school children do not have an individual entitlement to the full range of services offered public school children, but must only be afforded a genuine opportunity for equitable participation); 22 Individuals With Disabilities Educ. L. Rep. 369 (1994) (response letter stating same). We are aware of no evidence that the IDEA or its regulations have ever been interpreted otherwise. An agency's interpretation of its own regulations is entitled to substantial deference, unless it is plainly erroneous or inconsistent with the regulations. *Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381, 2386. Based on our analysis of the regulations, we find nothing plainly erroneous in the DOE's interpretation nor is it inconsistent with the regulations. We therefore adopt its interpretation as an accurate understanding of the law.

IV.

The only remaining question is whether the public school in this case properly exercised its discretion as outlined in the cross-referenced regulations. The standard is whether the student was provided with a genuine opportunity for equitable participation. We agree with the Fourth Circuit—the only other Circuit to have addressed this issue—that the essential component is that of opportunity. *Goodall*, 930 F.2d at 368. Where the public school makes available the necessary service at a public institution, giving the disabled student a genuine opportunity to participate, and nothing in the record indicates that it has otherwise abused

its discretion, the public school has discharged its obligation. See *id.* at 368-369. K.R. was offered the service of a full-time instructional assistant at Anderson Community School. We have no reason to doubt the opportunity was genuine: nothing in the record demonstrates that K.R. was prevented from attending the public school by anything other than a desire to attend private school; and nothing demonstrates that the public school would have failed to provide the instructional assistant had K.R. decided to return. K.R. was thus provided with a genuine opportunity that she rejected.

Most telling, though, is the fact that Anderson Community School did not simply discard its obligations under the IDEA when K.R. chose to attend private school. The public school has provided K.R. with speech therapy, occupational therapy, and physical therapy at a public school site during her attendance at St. Mary's. In providing these services at a public site and declining to provide an instructional assistant to a single student in the private school, it is evident that the public school fairly exercised its discretion to consider the number of eligible private school students and their needs in deciding what benefits will be provided. 34 C.F.R. §§ 76.651, 76.652(a)(3). A complete failure to provide any services, especially those that can be provided at a neutral or public school site at flexible times, would be strong evidence that the public school had abused its discretion. But there is no evidence here that Anderson Community School eschewed its responsibility under the IDEA.

V.

We conclude that the IDEA and its regulations do not require a public school to make comparable provisions for a disabled student voluntarily attending private school as for disabled public school students. Rather, public schools are given discretion under the law and need only provide voluntarily placed private school students a genuine opportunity for equitable participation. Here, Anderson Community School afforded K.R. a genuine opportunity for

the services of an instructional assistant at a public school, and she declined. Further, the public school's provision of other related services demonstrates that it reasonably exercised its discretion rather than eschew its responsibility once K.R. chose to attend private school. The decision of the district court is therefore reversed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA A07XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—4-12-96

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 28, 1996

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. DIANNE P. WOOD, Circuit Judge

K.R., an infant by her parents and next friends M.R. and K.R.R., and M.R. and K.R.R.,	)Appeal from the United)States District Court for the)Southern District of Indiana)Indianapolis Division
Plaintiffs-Appellees,	)
No. 95-2497	)No. 94 C 766
vs.	)David Hamilton, Judge
ANDERSON COMMUNITY SCHOOL CORPORATION	)
Defendant-Appellant	)

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by plaintiffs-appellees

on April 26, 1996, and the response of defendant-appellant, all of the judges on the panel have voted to deny a rehearing and no judge in active service has requested a vote on the suggestion for rehearing en banc. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

K.R., an infant by her parents and next friends, M.R. and K.R.R., and M.R. and K.R.R.,	)
Plaintiffs,	)
vs.	)
ANDERSON COMMUNITY SCHOOL CORPORATION,	)
Defendant.	)

CAUSE NO. IP 94-766-C H/G

MEMORANDUM OPINION

The central issue in this case is whether the federal Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1485, requires a local school corporation to provide for a child with disabilities an instructional assistant at a private parochial school. Plaintiffs are K.R., who is seven years old, and her parents. The defendant is the Anderson Community School Corporation. If K.R. attended public school, her disabilities would require the school corporation to provide a full-time instructional assistant to attend class with her. Plaintiffs seek declaratory and injunctive relief to obtain the same assistance for K.R. at the private parochial school she

attends. The court has subject matter jurisdiction under 20 U.S.C. § 1415(e) and 28 U.S.C. § 1331. The court grants the requested relief because the applicable federal regulation requires the school corporation to provide benefits to disabled private school students that are "comparable" to the benefits provided to disabled public school students. The school corporation must provide an instructional assistant for K.R. at St. Mary's School in Anderson, Indiana.[1]

Facts

K.R. has been diagnosed with several serious conditions: myelomeningocele, spina bifida, and hydrocephalus with a shunt. K.R. uses a wheelchair, which helps her achieve some limited mobility. However, she still needs someone to help move her from place to place, to position her, and to secure her so that she can participate in school activities. She also needs assistance in expressing language, both orally, through special speech therapy, and in writing, through compensation for her limited finger dexterity.

When K.R. was three years old, her parents enrolled her in the school corporation's pre-school program. She received there a number of special services. As K.R. approached kindergarten age, the school corporation held case conference committee meetings to develop an "individualized educational

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[1]The parties agreed to submit this case through briefs, stipulated written evidence, and the record of the administrative hearing in this matter. Oral argument was heard on April 12, 1995. This opinion sets forth the court's findings of fact and conclusions of law.

program" for K.R., as required and defined by the IDEA. *See* 20 U.S.C. § 1414(a)(5), 20 U.S.C. § 1401(a)(20). K.R.'s parents attended these meetings. At some point, they expressed a desire, based on their religious beliefs, for K.R. to attend St. Mary's School, a private parochial school, rather than the local public school. Records from as early as April 9, 1993, indicate this possibility.

Three case conference meetings resulted in a final recommendation on August 9, 1993, that K.R. be placed in a regular kindergarten class and be provided with related educational services including speech therapy, occupational therapy, physical therapy, transportation, and the services of an instructional assistant. Occupational and physical therapists would develop ways to transport and position K.R. They in turn would train both K.R.'s classroom teacher and an instructional assistant in the proper methods of transporting and positioning K.R. (A classroom teacher would have "extreme difficulty" providing K.R. assistance without an aide in the classroom.) The therapists would see K.R. approximately once a week to refine her services constantly and to make sure existing assistance was being provided properly. Neither party disputes these recommendations.

At the case conference meeting on August 9, 1993, the school corporation informed K.R.'s parents that it would not provide special services to K.R. at St. Mary's. The school corporation relied on 511 Ind. Admin. Code § 7-4-4(c), which authorizes a school corporation to decide where it will provide special education services. Pursuant to the procedure set forth in the IDEA at 20 U.S.C. § 1415 and in related Indiana regulations, plaintiffs requested on August 26, 1993, a due process hearing to address the school corporation's refusal to provide an instructional assistant at St. Mary's. News of the plaintiffs' request for a hearing apparently prompted the school

corporation to take new action. Without notice to plaintiffs, it sent a physical therapist and an occupational therapist to St. Mary's on September 3, 1993, to evaluate physical accessibility there.

In the meantime, K.R. started kindergarten at St. Mary's that fall. Since then, K.R.'s mother, M.R., has attended school full-time with K.R., serving as the instructional assistant that the school corporation refused to provide. The school district has provided speech therapy, occupational therapy, and physical therapy for K.R. at a public school site, as well as transportation to that site. Plaintiffs do not challenge the location for those services.

A hearing officer presided over an evidentiary hearing on October 26, 1993, which addressed the location for K.R.'s instructional assistant services. School corporation witnesses testified that the positioning methods they used for K.R. in pre-school could also be used at St. Mary's because no special equipment was required. However, they expressed concerns about K.R.'s safety in being transported at St. Mary's.[2]

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[2]St. Mary's School is in a multi-story building that is not wheelchair accessible. School corporation witnesses expressed concern that an instructional assistant would have to carry K.R. up eight steps to enter the building, twenty-four steps to attend art and music classes, twelve steps to attend physical education class, and additional steps up and down for recess and for required services in a church across the street from the school. The school corporation witnesses said that K.R. is more likely to be injured seriously if she falls than an average person would be. They also expressed concern about K.R.'s safety in a potential emergency situation, such as a fire. Plaintiffs do not

(continued...)

Although the school corporation had not based its original refusal to provide an instructional assistant at St. Mary's on this ground, it argued in the hearing (and before this court) that safety was a specific goal expressed in K.R.'s individual education program, and that it cannot in good conscience provide an instructional assistant to K.R. at St. Mary's, thereby facilitating K.R.'s education in violation of the safety goal.

The hearing officer ultimately decided that the school corporation was not obligated to provide the instructional assistant for K.R. at St. Mary's. Plaintiffs appealed to the Indiana Board of Special Education Appeals, which upheld the decision of the hearing officer. Having exhausted their administrative remedies, plaintiffs then filed a complaint with this court. K.R. has nearly completed the first grade at St. Mary's. Her mother, M.R., still attends school with her and serves as her instructional assistant.

The Parties' Claims

K.R. and her parents rely on the IDEA and accompanying regulations which require the school corporation to provide to children in private schools special education services that are "comparable" to those services offered to children in the public school system. Plaintiffs also argue that even if the IDEA itself does not require the school corporation to provide an instructional assistant for K.R. at St. Mary's, the school corporation's failure to do so, along with K.R.'s acknowledged need for an instructional assistant, imposes a

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(...continued)
dispute these facts about the physical facilities of the St. Mary's building, but say they are working with St. Mary's to make the school more accessible to K.R. and other disabled children.

substantial burden on their choice to have K.R. attend St. Mary's. Plaintiffs claim that this burden violates their First Amendment right to free exercise of religion and also violates the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4.

The school corporation acknowledges K.R.'s need for an instructional assistant, and it is willing to provide an instructional assistant if K.R. and her parents choose for her to attend a public school. However, the school corporation argues that the federal regulations do not entitle K.R. to an instructional assistant at a private school, and it further asserts that an Indiana state regulation gives it the discretion to choose where to provide an instructional assistant. The school corporation denies that its exercise of discretion here violates the First Amendment's Free Exercise Clause or the Religious Freedom Restoration Act. Instead, the school corporation claims that providing an instructional assistant for K.R. at St. Mary's would violate the general goal of safety set forth in the individual education plan for K.R., and would violate Article I. Section 6 of the Indiana Constitution, which prohibits expenditures of public funds for the benefit of religious institutions.

Burden of Proof / Standard for Review

In reviewing administrative decisions under the IDEA, a district court must make an independent decision as to whether the requirements of the IDEA have been satisfied. *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 293 (7th Cir. 1988). The court must base its decision on a preponderance of the evidence, and may receive and consider evidence not presented earlier in administrative proceedings. 20 U.S.C. § 1415(e)(2). The administrative proceedings must receive "due weight," however, because courts should not

"substitute their own notions of sound educational policy for those of the school authorities which they review." *Board of Education v. Rowley*, 458 U.S. 176, 206 (1982). Thus, as Judge Brooks has described, for most cases, "the standard of re .ew for IDEA cases lies somewhere in between the review accorded an administrative determination and a *de novo* examination." *Elizabeth K. v. Warrick County Sch. Corp.*, 795 F. Supp. 881, 885 (S.D. Ind. 1992). In light of the issues in this case, the standard of review is closer to the *de novo* end of the spectrum. This case does not present any substantial question of educational policy. The parties agree that K.R. needs an instructional assistant. The central dispute here is a matter of law: the interpretation and application of a federal regulation that extends certain rights to disabled children who choose to attend private schools.

IDEA Benefits for Private School Students

The IDEA was enacted in part to "assure the effectiveness of efforts to educate children with disabilities." 20 U.S.C. § 1400(c). The Act emphasizes special education and related services, and provides funding for local school district programs. Regulations adopted pursuant to the IDEA set forth the details of the program. *See* 20 U.S.C. § 1417(b). Local school districts must comply with the federal regulations in order to receive federal funding assistance, which is administered through state agencies.

The IDEA extends benefits to private school students. Specifically, the IDEA itself provides that if a particular child's needs cannot be met in the public school system, that system is still responsible for the child's education, even if it places the child in or refers the child to a private school or facility. 20 U.S.C. § 1413(a)(4); *see also* 34 C.F.R. §§ 300.401 - 300.402. The regulations provide that if a child's needs can be

met in the public school system, and if the parents choose to place the child in a private school or facility, the public system is not required to pay for the child's tuition at the private school. 34 C.F.R. § 300.403(a). That is the situation we have here. However, where parents choose to place a child in a private school, the public system still must "provide special education and related services designed to meet the needs of private school children [as well as public school children] with disabilities residing in the jurisdiction of the [local school district]." 34 C.F.R. § 300.452; *see* 34 C.F.R. § 300.403(a).

In providing special services to private school students, the public school system must meet a number of standards. 34 C.F.R. § 300.451 (applying the more general education regulations, 34 C.F.R. §§ 76.651-76.662). Central in this case is the following standard:

> *Comparable benefits.* The program benefits that a subgrantee [local school district] provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools.

34 C.F.R. § 76.654(a).

The parties agree that if K.R. attended public school, the school corporation would provide an in-class instructional assistant. Plaintiffs therefore argue that the "comparable benefits" provision of 34 C.F.R. § 76.654(a) requires the school corporation to provide an instructional assistant for K.R. at St. Mary's School. They say the school corporation's refusal to provide the benefit of instructional assistant services to K.R. means that the school corporation is not providing her a benefit

"comparable in quality, scope, and opportunity for participation" to the benefit of instructional assistant services provided in a public school for a public school student. Unlike some other services that can be provided from time to time, such as scheduled speech, occupational, and physical therapy, the purpose of an instructional assistant is to provide assistance in the classroom virtually all the time. This particular benefit would be meaningless if the assistant were not at the private school with K.R., in her classroom. Thus, in order for K.R. to receive a benefit comparable to the benefit she would receive if she attended public school, argue the plaintiffs, she must be provided with an instructional assistant at her private school. As explained below, this court agrees.

Published decisions in two federal court cases have directly addressed 34 C.F.R. § 76.654 and have held that it did not require public school systems to provide in private school settings the particular special education services requested by students with disabilities and their families. In *McNair v. Cardimone*, 676 F. Supp. 1361 (S.D. Ohio 1987), the plaintiff parents placed their hearing-impaired child in a private religious school and wanted the local public school system to pay for transportation to the private school. The district court held that § 76.654 did not require the public system to pay for that service:

> The state is not required to provide duplicate services at the private school. Section 76.654 imposes no additional requirement that the state pay for a child's special education and related services when the child's parents decline the free appropriate public education offered by the state and choose to enroll the child in a private school.

676 F. Supp. at 1366. On appeal, the Sixth Circuit did not agree with the district court's rationale but affirmed the judgment, holding that because the particular benefit at issue — transportation — was not designed to meet the special needs of the child, the public school system was not required to provide it as an IDEA service. *McNair v. Oak Hills Local Sch. Dist.*, 872 F.2d 153, 156-57 (6th Cir. 1989) (citing 20 U.S.C. § 1400(c)). *Cf. McNair*, 676 F. Supp. at 1363 ("if transportation services need to be provided to handicapped children in order for them to participate in special education. the state is required to provide transportation service even though such service is not required by the nature of their handicap").

McNair differs from the present case because the services at issue here — those of an instructional assistant — are indisputably tied to K.R.'s special needs. In *McNair*, the district court and the Sixth Circuit noted that the disabled child needed no more transportation services than any other child. 676 F. Supp. at 1363, 1371; 872 F.2d at 155. By providing transportation, the public school district would not have been compensating for a disability, as the IDEA mandates. Instead, it would have been granting a benefit that non-disabled private school students might want but would not be entitled to receive. The reasoning of *McNair* therefore does not apply to this case.

The second case interpreting § 76.654 is *Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363 (4th Cir. 1991), in which the parents of a hearing-impaired child wanted a public school system to provide a cued speech interpreter at the private school where they had chosen to enroll the child. Like the instructional assistant plaintiffs seek here, the interpreter would have needed to attend class with the child full-time in order to offer valuable service to him. The Fourth Circuit held that the IDEA and regulations, including 34 C.F.R. § 76.654(a).

did not require the school district to provide the interpreter at the private school. The court concluded: "If the County's offer of services in a public school is 'meaningless' to Matthew [the student], as his parents claim, it is because of the parents' decisions and conditions for Matthew's education, not by the operation of any state or federal law." 930 F.2d at 369.

In the present case, as in *Goodall*, the parents made the decision for the student to attend the private school. If the Fourth Circuit's interpretation of § 76.654(a) in *Goodall* is correct, then this court would need to deny the relief the plaintiffs seek. That result would be contrary to the plain language of § 76.654(a), for it would mean that as applied to the services of an instructional assistant — services essential to K.R.'s education at any school — she would receive no benefits at all because she attends St. Mary's. No benefits are not the "comparable" benefits required by § 76.654(a).

The Fourth Circuit cited four main sources of authority for its decision in *Goodall* on this issue: (1) the district court opinion in *McNair*; (2) the Fourth Circuit's decision, *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146 (4th Cir. 1991), holding a school district was not required to provide special education services at a public high school closer to plaintiff's house than the school where the services were provided; (3) an IDEA regulation prohibiting use of funds for religious purposes, 34 C.F.R. § 76.532; and (4) a United States Department of Education administrative ruling. *See Goodall*, 930 F.2d at 367-69.

This court disagrees with the Fourth Circuit's reliance on these four sources of authority. First, as explained above, *McNair* dealt with a service that was not sufficiently related to the particular child's needs in order to qualify under the IDEA. Second, *Barnett* dealt with services provided to a public school

student at a public site, and the principal issue was whether the school corporation would be required to duplicate an extensive program of services at another public school more convenient to the plaintiff. 927 F.2d at 152. Neither *McNair* nor *Barnett* addressed the real focus of § 76.654(a) — whether IDEA services provided to private school students must be "comparable" to those provided to public school students.

Third, the regulation cited in *Goodall*, 34 C.F.R. § 76.532, which prohibits use of funds for religious purposes,[3]

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[3]Use of funds for religion prohibited.

(a) No State or subgrantee may use its grant or subgrant to pay for any of the following:

(1) Religious worship, instruction, or proselytization

(2) Equipment or supplies to be used for any activities specified in paragraph (a)(1) of this section.

(3) Construction, remodeling, repair, operation, or maintenance of any facility or part of a facility to be used for any of the activities specified in paragraph (a)(1) of this section.

(4) An activity of a school or department of divinity.

(b) As used in this section, "school or department of divinity" means an institution or a component of an institution whose program is specifically for the education of students to:

(1) Prepare them to enter into a religious vocation; or

(continued...)

must be considered in conjunction with 34 C.F.R. § 76.658, which provides:

> Funds not to benefit a private school.
>
> (a) A subgrantee [school district] may not use program funds to finance the existing level of instruction in a private school or to otherwise benefit the private school.
>
> (b) The subgrantee *shall* use program funds to meet the specific needs of students enrolled in private schools, rather than:
>
> (1) The needs of a private school; or
>
> (2) The general needs of the students enrolled in a private school.

(Emphasis added.) Under these two regulations, the question is whether public IDEA funds are used to benefit the private school (by going toward religious worship or instruction, equipment or supplies, physical facilities, or school activities) or are used instead to benefit a particular qualifying IDEA student (by going toward services designed to meet her specific needs). Here, it is clear that funding for an instructional assistant for K.R. would be used to meet her specific needs, not

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(...continued)

> (2) Prepare them to teach theological subjects.

to subsidize St. Mary's more generally as a school or religious institution.

After *Goodall* was decided, the Supreme Court confirmed that § 76.532 does not create any separate regulatory limitation for the IDEA, but "merely implements the Secretary of Education's understanding of (and thus is coextensive with) the requirements of the [federal] Establishment Clause." *Zobrest v. Catalina Foothills Sch. Dist.*, ___ U.S. ___, ___, 113 S.Ct. 2462, 2465 n.7 (1993) (acknowledging that Fourth Circuit placed a different interpretation on § 76.532). Thus, § 76.532 itself should not undermine the rights granted to private school students by § 76.654(a).

Fourth, the cited U.S. Department of Education administrative ruling offers only limited support for the *Goodall* holding.[4] In response to a claim by the school corporation that the particular benefit being sought would violate a state law, the Goodall family requested a "by-pass" from the Department of Education. Under the by-pass procedure, the local school corporation and supervisory state agency would be exempt from the IDEA requirement that

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[4]Agency rulings are entitled to some deference, but "this deference is constrained by [a court's] obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979) (quoting *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers v. Daniel*, 439 U.S. 551, 566 n.20 (1979)); *Tribble v. Montgomery County Bd. of Educ.*, 798 F. Supp. 668, 672 (M.D. Ala. 1992), *vacated after joint motion to dismiss appeal granted* (1993). A court must also honor the clear meaning of a valid regulation, such as 34 C.F.R. § 76.654(a) in this case.

supposedly violated the state constitution or state statute. Instead the federal agency itself would provide the required service. *See* 20 U.S.C. § 1413(d). The Department responded in part:

> [Public educational agencies] do not necessarily have to provide services on the premises of private schools in order to meet their obligations under [the IDEA]. . . . Whether [a local educational agency] would have to provide on-site services to meet the 'equitable participation' requirement would depend on the specific facts respecting each of the students with handicaps enrolled in private schools within its jurisdiction to whom it is providing services.

Goodall, 16 EHLR 1398, 1399-1400 (1990), *quoted in Goodall*, 930 F.2d at 368. The Department also said: "At most, [a Virginia law] precludes [local educational agencies] from serving children with handicaps on the site of private sectarian schools." *Id.* Given that the Department (1) tied the requirement for on-site IDEA services at a private school to a child's particular needs, (2) implied a Virginia law prohibited Virginia school corporations from providing services at private sectarian schools, and (3) denied the Goodalls' request for a by-pass which would have absolved the school corporation of responsibility but still provided the federally-required IDEA services, it appears that the Department believed the Goodall child's particular needs did not mandate on-site services.

Based on the limited factual information in the *Goodall* opinion, however, it appears to this court that the needed interpreter there could have been useful only on-site, just as plaintiffs here claim an instructional assistant would be useful

to K.R. only on-site. Despite this apparent dissonance, the Department of Education ruling cited by the Fourth Circuit states clearly that whether a public school system must provide a particular service in a private school depends on the facts of the particular situation, and not on a sweeping rule that a school corporation is *never* required to provide IDEA services at a private parochial school. Overall then, this court agrees with the view expressed in the Department of Education ruling cited in *Goodall* but disagrees with the Fourth Circuit's interpretation and application of § 76.654(a).

Regardless of whether the Constitution would compel such a result, Congress and the Department of Education have chosen as a matter of federal educational policy to extend substantial benefits to students in private schools. The IDEA and its regulations tie special education services to students themselves rather than to specific educational sites. *See Zobrest v. Catalina Foothills Sch. Dist.*, ___ U.S. ___, ___, 113 S.Ct. 2462, 2469 (1993). Those regulations create legally enforceable entitlements for all private school students with disabilities, no matter how they were placed. *See Tribble v. Montgomery County Bd. of Educ.*, 798 F. Supp. 668, 671-73 (M.D. Ala. 1992), *vacated after joint motion to dismiss appeal granted* (1993). By requiring program benefits for private school students that are "comparable in quality, scope, and opportunity for participation" to those offered to public school students, § 76.654(a) is plainly designed to remove (or at least to minimize) a child's disability as a factor for the child and her parents to consider in choosing between a public school and a private school. Thus, under § 76.654(a), a disabled child and her parents should have essentially the same practical choice between the local public school and a private parochial school that a child without such special needs would have.

There are limits to the theoretical guarantee of an equal choice. Section 76.654(a) does not require that special education benefits for private school students be *identical*, but only that they be "*comparable* in quality, scope, and opportunity for participation" to the benefits for public school students. In *Wheeler v. Barrera*, 417 U.S. 402 (1974), the Supreme Court interpreted identical language in a regulation applying to Title I of the Elementary and Secondary Education Act of 1965. *See* 417 U.S. at 407. The Court held:

> [A]lthough it may be difficult, it is not impossible under the Act to devise and implement a legal local Title I program with comparable services despite the use of on-the-premises instruction in the public schools but not in the private schools. . . . In order to equalize the level and quality of services offered, something must be substituted for the private school children. The alternatives are numerous.

Id. at 424-25. Alternatives mentioned included teacher training institutes, Saturday enrichment courses, media centers, educational summer camps, bookmobiles, etc. *Id.* at 425 n.20.

The analysis of educational comparability in *Wheeler* dealt with an aggregate group of students, for whom different types of services could be equally beneficial. In the present case involving the IDEA, however, the proper focus must be on K.R.'s particular needs. Here, there simply is no "comparable" alternative to in-class services provided by an instructional assistant, and the school corporation does not claim to be offering one. What the school corporation does offer to K.R. as long as she attends St. Mary's School — periodic contact with an instructional assistant at a public site — would not

provide her with the benefit of an instructional assistant at all. Yet the school corporation agrees that if K.R. were to attend public school, it would provide her the benefit of having an instructional assistant in class. Because 34 C.F.R. § 76.654(a) mandates comparable benefits, the school corporation must provide an instructional assistant for K.R. at St. Mary's School.

The School Corporation's Defenses

The school corporation has offered, at different times and in different combinations, three defenses for its refusal to provide an instructional assistant at St. Mary's. First, the school corporation relies on an Indiana regulation that gives it the choice of locations for special education services. Second, the school corporation says K.R. cannot safely attend St. Mary's with an instructional assistant. Third, the school corporation argues that the Indiana Constitution forbids assistance to parochial schools. As explained below, none of these arguments justifies the school corporation's refusal to provide an instructional assistant here.

The court notes initially that the school corporation's various positions during the last two years reflect, at best, considerable confusion. The school corporation even makes the claim that, while it is looking out for K.R.'s best interests, her parents are "callous and cavalier" toward her safety.[5] Based

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[5]The school corporation states in its brief:

> Plaintiffs argue at page 26 of their Brief that the needs of the child and the safety of the child are not relevant to this case. This is indeed a callous and cavalier attitude. Would Plaintiffs

(continued...)

on the record before this court, that assertion is both absurd and offensive. The record shows that K.R.'s parents have nothing but K.R.'s best interests in mind. They have made, and no doubt are prepared to continue to make, great sacrifices to give her an appropriate education despite the school corporation's failure to fulfill its obligations. In contrast, the twists and turns in the school corporation's positions raise serious doubts about its good faith in at least its recent dealings with K.R. and her family.[6] Nevertheless, no matter when or how offered, the school corporation's arguments are not frivolous and deserve discussion.

The Indiana state regulation at issue provides as follows:

> At the election of the public school corporation, special education and related services may be provided at:

(...continued)

> insist that K.R. be taught in a building with no heat or one where pieces of the ceiling kept falling on the students? Apparently, Plaintiffs would say that K.R. could wear her winter coat and a football helmet.

Brief of Defendant in Opposition to Complaint, at 8.

[6]The record does indicate, however, that some school corporation employees have worked hard for K.R.'s benefit in developing her individual educational plan and providing her with many special educational services. The court does not ignore or intend to demean their efforts.

(1) the private school or facility;
(2) the public school; or
(3) a neutral site.

511 Ind. Admin. Code § 7-4-4(c). The school corporation claims that this regulation gives it the discretion to provide instructional assistant services to K.R. at its public school site and not at St. Mary's.

For other services, the discretion provided by this state regulation may very well be consistent with federal law. For example, the benefit private school students would receive from a speech therapy class held once a week at a public school might well be "comparable" to the benefit public school students would receive from the same class. By that reasoning, the school corporation might be able to choose to provide the speech class only at the public school, and not to provide a separate speech class at the private school. In this case, however, the parties agree that K.R. needs an instructional assistant throughout every school day and that the school corporation would meet this need if K.R. were a public school student. Therefore, under the federal regulation, 34 C.F.R. § 76.654(a), the school corporation must provide an instructional assistant for K.R. at St. Mary's, and under the Supremacy Clause, of course, an applicable federal regulation takes precedence over a state regulation where the two directly conflict. *See* U.S. Const. art. VI, cl. 2.

In response to an interrogatory, the school corporation suggested that it would be more expensive to provide an instructional assistant at St. Mary's than at the public school.[7]

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[7]Plaintiffs asked the school corporation to assume the (continued...)

One might imagine a test of comparability that would focus on expense rather than on quality, scope, and access, so that the public school system would have to spend an equal amount of money, but not more, on special services for private school students and public school students. However, § 76.654(a) requires comparability in "quality, scope, and opportunity for participation," without any reference to cost. In fact, 34 C.F.R. § 76.655(b) provides:

> The subgrantee [local school corporation] shall spend a different average amount on program benefits for students enrolled in private schools if the average cost of meeting the needs of those students is different from the average cost of meeting the needs of students enrolled in public schools.

Under these regulations, the school corporation must provide an instructional assistant at St. Mary's even if the net cost to the school corporation is more than for an instructional assistant at the local public school.

Next, the school corporation's safety argument also does not justify its refusal to provide an instructional assistant at St. Mary's. The school corporation did not even raise any

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continued)
instructional assistant would not have to transport K.R. up and down stairs and then asked the school corporation to state any alternative reason for not providing the instructional assistant at St. Mary's. The school corporation responded: "Lack of supervision for an employee of Defendant. An instructional assistant could perform other duties for Defendant if it were at one of the Defendant's sites."

concerns about safety and accessibility until the administrative hearing, long after it had decided not to provide an instructional assistant at St. Mary's. Although it had known for some time that plaintiffs might choose to place K.R. at St. Mary's, it did not actually base its decision on any safety concerns. The school corporation did not send its employees to inspect St. Mary's until after it had made its decision not to provide an instructional assistant there, and after plaintiffs formally requested a hearing to appeal that decision.

Once the school corporation did raise safety as an issue, it assumed the instructional assistant would help K.R. move about at school. Plaintiffs claim in their briefs that M.R. would continue to transport K.R. at school even if a publicly-funded instructional assistant performed other services. However, K.R.'s parents have made the following statements regarding M.R.'s role in providing services:

> [I]t is not in K.R.'s best interest to always have her mother present with her as she attends school. Her social, emotional and academic development are hindered by [M.R.'s] constant presence. . . . [T]he lack of services of an instructional assistant for K.R. places a burden on [M.R.], in providing those services, and on K.R., in that she will not fully develop socially, emotionally and academically independent of her parents.

Affidavits of M.R. and K.R.R., ¶¶ 13-14. Given the expressed goal of eliminating M.R.'s constant presence at K.R.'s school, this court follows the school corporation's assumption that the instructional assistant, rather than M.R., would be responsible for assisting K.R. move about at school, at least most of the time. Therefore, the school corporation might be liable for

negligent actions of the instructional assistant. As noted already, however, extra costs for the school corporation, including potential costs of liability, do not provide a valid basis for the school corporation's decision.

The court assumes that genuine concerns about safety may be relevant in determining whether a school corporation is meeting its obligations under the IDEA and § 76.654(a). But to justify its flat refusal to provide an instructional assistant, the school corporation would need to prove that there would be no reasonably safe way to provide K.R. the services of an instructional assistant at St. Mary's. It has not done so. The evidence the school corporation presented at the administrative hearing to show that K.R. could not safely attend St. Mary's is both vague and scant. In fact, the record shows that K.R. has been attending St. Mary's safely for nearly two years, with her mother acting as an instructional assistant. A safe past does not assure a safe future, but the school corporation's amorphous and *post hoc* concerns for K.R.'s safety do not justify its refusal to comply with 34 C.F.R. § 76.654(a).

Finally, the school corporation has also argued that the Indiana Constitution prohibits public money from going to the benefit of any religious institution. It apparently places some reliance on this argument for it asserted in response to an interrogatory: "The Defendant would not provide a related service of an instructional assistant in a physically accessible private school. . . ."[8] At oral argument, the school corporation claimed that it is never obligated to provide *any* special education services at a private site to a child placed there

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[8]Of course, this contention further undermines the school corporation's reliance on supposed concerns about K.R.'s safety.

voluntarily by her parents. The school corporation admits that it has provided, and is currently providing, special education services at several private parochial schools, including St. Mary's. But the fact that the school corporation has been providing these benefits does not mean that the practice either is or is not constitutional. Again, the school corporation has asked for a decision on this issue, so the court must address it regardless of the school corporation's inconsistency or strategy in making the argument.

The school corporation could not argue, with any hope of success, that it would violate the federal Establishment Clause by providing an instructional assistant at St. Mary's for K.R. *See Zobrest v. Catalina Foothills Sch. Dist.*, ___ U.S. ___, 113 S.Ct. 2462 (1993) (holding a public school district did not violate the Establishment Clause in providing an interpreter under the IDEA to a deaf student in a Catholic school). Instead, the school corporation raises the separate possibility of violating a clause of the Indiana Constitution, which provides: "No money shall be drawn from the treasury, for the benefit of any religious or theological institution." Ind. Const. art. I, § 6. The school corporation cites for support a case in which a public trustee responsible for providing emergency food and shelter to the homeless had reimbursed private religious missions that required guests to attend religious services. The Indiana Court of Appeals held that the public trustee violated Article I, Section 6. *Center Township of Marion County v. Coe*, 572 N.E.2d 1350, 1360 (Ind. App. 1991).

St. Mary's requires its students to attend religious services, but the school corporation is not being asked to pay St. Mary's directly to provide religious or general educational services. Instead, the school corporation is supposed to provide an individual disabled student with special services, no matter what school she attends. The Supreme Court of the United

States has held already that "[h]andicapped children, not sectarian schools, are the primary beneficiaries of the IDEA," and "under the IDEA, no funds traceable to the government ever find their way into sectarian schools' coffers." *Zobrest*, ___ U.S. at ___, 113 S.Ct. at 2469, 2468.[9] The school corporation has not shown that Article I, Section 6 of the Indiana Constitution imposes a more stringent standard or requires a different result than the federal Establishment Clause as applied in *Zobrest*. Therefore, the school corporation would not be violating Article I, Section 6 of the Indiana Constitution by providing IDEA services at a private, religious school. *See also Felter v. Cape Girardeau Sch. Dist.*, 810 F. Supp. 1062, 1068-70 (E.D. Mo. 1993) (public school district would not violate Missouri Constitution by providing specially needed transportation service to private school student under IDEA).[10]

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[9]"The only indirect economic benefit a sectarian school might receive by dint of the IDEA is the handicapped child's tuition — and that is, of course, assuming that the school makes a profit on each student; that, without an IDEA [service], the child would have gone to school elsewhere; and that the school, then, would have been unable to fill that child's spot." *Id.* at 2468.

[10]Even if Article I, Section 6 prohibited the school corporation from providing K.R. an instructional assistant at St. Mary's partially with state funds, the federal Department of Education would be required to provide K.R. the same service with exclusively federal funds. The IDEA states that if a school corporation would violate state law by providing IDEA services to a student placed in a private school, then the U.S. Secretary of Education shall implement a "by-pass" to waive the troublesome requirement for the state. 20 U.S.C. (continued...)

Conclusion

Plaintiffs' request for declaratory and injunctive relief is granted. The IDEA and related regulations require the Anderson Community School Corporation to provide the services of an instructional assistant to K.R. at St. Mary's School. Because plaintiffs are entitled to relief under the IDEA, this court need not decide whether the First Amendment's Free Exercise Clause and/or the Religious Freedom Restoration Act would independently require the same result. The court will enter a permanent injunction ordering the Anderson Community School Corporation to comply with its obligations. The court will enter final judgment separately. Plaintiffs shall submit a petition for attorneys fees and costs pursuant to 20 U.S.C. § 1415(e)(4) and 42 U.S.C. § 1988 within the fourteen days provided by Fed. R. Civ. P. 54(d)(2).

So ordered.

Date: May 25, 1995

/s/
DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

(...continued)
§ 1413(d); 34 C.F.R. §§ 300.480 - 300.481. After a by-pass, the Secretary of Education is responsible for arranging the federally-required services to be provided for the particular child. 20 U.S.C. § 1413(d) (for students placed in private schools by public school corporations); 34 C.F.R. § 300.481 (for all students in private schools).

INDIANA CODE §20-1-6-4

Sec. 4. The state of Indiana hereby accepts all of the provisions and benefits of all laws enacted by the Congress of the United States which provide for aid to children with disabilities, and the Indiana state board of education is hereby designated as the proper authority and is authorized toaccept any federal funds appropriated for the purpose of aiding in the education children wit disabilities and the Indiana state board of education shall comply with all the requirements of federal law concerning any such federal funds relating to such special educational activities as well as with any amendments thereto or rules and regulations issued thereunder and in conformity therewith, and not inconsistent with the provisions of this chapter. *As amended by P.L. 2-1988, SEC.431; P.L. 23-1993, SEC.85.*

INDIANA DEPARTMENT OF EDUCATION
ARTICLE 7
HEARING DECISION
HEARING NO: 712-93

The purpose of this Hearing was to gather evidence and to hear testimony in preparation for rendering a decision regarding educational matters found in a petition submitted by the student's parents. They requested a hearing in a letter dated August 26, 1993 that was sent to the Indiana Department of Education, where it was received on September 1, 1993. The parents stated that the reasons that we are requesting a hearing is the refusal of the Anderson Community School Corporation to provide our daughter with the related service of an Instructional Assistant at [name of school]".

A prehearing conference was convened by the Hearing Officer on September 28, 1993, with attendance by the student's father, counsel from Indiana Protection and Advocacy Services representing the petitioner, counsel for the School Corporation, and the Director of Special Education and Assistant Director of Special Education for the School Corporation. At the conference, the parent requested that the Hearing be closed to the public and that witnesses be separated, which were granted. The following issue was delineated for the Hearing:

> whether the school corporation should
> provide an instructional assistant at the
> private parochial school

Prior to the Hearing, Counsel for the Petitioner submitted a Request for Preliminary Order to the Hearing Officer, asking that he order the school to maintain the current related services as provided in the child's

Individualized Education Program (IEP). There was concern that the school was considering not providing these services while the Hearing was in progress. At the prehearing conference, Counsel for the Petitioner also asked that an issue be added regarding whether the school corporation should reimburse the parents for expenses (primarily mileage for transporting the child to the public school site for related services) for the 1992-93 school year and part of the 1993-94 year to that point. The school corporation agreed to continue providing the related services and to reimburse the mileage expenses as requested by the parents. Consequently, these concerns were resolved and were not added as issues in the Hearing.

The school corporation requested an extension of time past the date of October 16, 1993, which was granted to December 3, 1993. The parties exchanged exhibits and witness lists before October 20, 1993, as per the five-day rule. The Hearing was convened on October 26, 1993, at the Administrative Offices of the school corporation. It was determined that all due process procedures had been followed correctly prior to the Hearing. A brief prehearing conference was held prior to the beginning of testimony to clarify questions. The hearing proper commenced at about 8:40 a.m., and all exhibits were admitted as presented by the parties. Petitioner's exhibits were labeled as "P-l", "P-2", etc., and the Respondent's exhibits were labeled as "R-l", "R-2n, etc. Counsel for the Petitioner questioned the school corporation's use of a written summary of a court case, as opposed to having the actual text. Counsel for the School Corporation agreed to refer to the case in oral comments. Later in the testimony, a witness referred to some material that described an orthopedic device. The document was included as a new exhibit for the Petitioner and was labeled

"P-23", with agreement by the school. The School Corporation also included copies of portions of Article 7 and the Indiana Constitution as controlling authority, and a copy of *Goodall by Goodall v. Stafford County School Bd.* from the 930 Federal Reporter.

The Hearing was closed to the public, and witnesses were instructed not to discuss their testimony or that of others until the Hearing was completed. In attendance were the Hearing Officer, Counsels for the Petitioner and the School Corporation, the Director of Special Education, the parents, and an observer from Indiana Protection and Advocacy Services. The Hearing was called to order at about 8:40 a.m., with opening statements made by representatives of the parties. The Hearing was adjourned at about 3:30 p.m.

FINDINGS OF FACT

After careful consideration of the testimony and written evidence presented during the Hearing, the following FINDINGS OF FACT were found to be pertinent to the issues:

1. The student is a six-year-old girl who has been determined to have multiple handicaps and is eligible for special education services. The child's handicaps include motor and expressive language difficulties, and she has received diagnoses of myelomeningocele, spina bifida, and hydrocephalus with a shunt. She is non-ambulatory and needs considerable assistance with positioning for activities, self-help skills, and motor movements.

2. Evidence and testimony indicate that the parties agree that the child is appropriately identified as multiply handicapped and is eligible for related services of physical therapy (PT), occupational therapy (OT), and speech-language therapy (SLT).

3. The child currently is enrolled in a private parochial school at the election of the parents, where she attends a regular kindergarten classroom. The parties agree that the student needs an instructional assistant to receive full benefit of her educational program, but disagree as to where the service is to be provided.

4. Testimony indicated that the Petitioner contends the school has the obligation to provide the assistant at the private school site, while the school corporation maintains that they have the right to select where the services will be provided. In this case, the school proposed to provide the services at a local elementary school.

5. Evidence and testimony indicated that three case conferences were held in April, July, and August of 1993 to develop an IEP for the child and to resolve the issue of the instructional assistant while she attends the parochial school. Although the content of the IEP was agreed to by the parties, the school refused to provide the assistant at the private school, and the parents wished to keep the child enrolled there. The private school is unwilling to assume the expenses for the assistant.

6. Evidence and testimony indicated that the student has significant mobility limitations and must be carried or transported in a stroller or other device. At present, her mother serves as the instructional assistant for her daughter in the classroom.

7. Evidence and testimony indicated that the private school has several steps and three floors, and no ramps or elevators that render it accessible to wheelchairs or similar modes of transportation. The restrooms are not adapted for the handicapped, and the student must eat in the principal's office, because of accessibility problems with the cafeteria.

There are no immediate plans to make the school accessible for the handicapped, although the topic has been discussed.

8. Evidence and testimony indicated that the school corporation has three elementary schools that are accessible to the handicapped, are on one floor, and any one of them could be the child's school of attendance. The public schools also have restroom and eating facilities that have been adapted for the handicapped, and the child would have full access to all school rooms, services, and facilities. Restroom facilities are adapted for the handicapped. At some point, the child will need to be catheterized, which is a medical decision (Transcript, p. 57).

9. Testimony by the school corporation's physical and occupational therapists indicate that the student has low muscle tone and needs help with gross and fine motor movement and positioning for some tasks and activities. The physical therapist indicated that she would prefer that the student begin the use of an adaptive wheelchair within the near future, and the use of prone standers is not feasible. The therapist has concerns about the child's safety in the private school, because as she is transported up and down stairs by an assistant, there is in some danger of injury if the assistant would fall. Because the student has motor limitations, there is concern that she would not be able to use her hands and arms to "break her fall", as would most children her age. The concern is of additional importance, given that the child has a cerebral shunt, and a head injury could have even more negative consequences. Parents and school personnel feel that the risk of injury to the child is minimal.

10. Testimony indicated that the school is concerned about the safety of the child, as well as potential legal liability for injuries that might occur to the child or assistant, should there be an accident. School personnel also expressed

some concern about being able to adequately supervise and monitor the assistant if the supervisors are not on site on a regular basis, although on-site supervision is not required in Article 7.

11. Testimony indicated that the assistant would be a public school employee and be under the supervision of the school, although s/he necessarily would interact with parochial school staff and teachers. Private school personnel are approving of this arrangement, but the principal wanted it made clear to the assistant that no comments or actions would be permitted that would be contradictory to the religious mission of the school. The principal did not know if the school would assume liability under their insurance program if an injury to the child or assistant would occur.

12. Testimony from the classroom teacher indicated that the assistant would be working directly with the child at least 50% of the time, and probably more, but she would not expect the assistant to help her with other duties while not assisting the child.

13. Testimony from the Director of Special Education indicated that she feels the school can provide a better and free appropriate public education (FAPE) to the student if she attended the public schools. It was her testimony that the school can provide barrier-free access to programs and facilities, there is increased socialization that does not occur at the private school, and the overall quality and services of the special education program are more appropriate for the student's needs than are those of the parochial school. She also expressed concern about the safety of the child while being transported up and down stairs, exit during emergencies, and liability of the school. It is the position of the school that Article 7 permits the school to elect where

they will provide services under 511 IAC 7-4-4(c)(1), and they elect to provide it at a local school site.

CONCLUSIONS OF LAW

After careful and complete consideration of all testimony and written evidence, and having undertaken review of the FINDINGS OF FACT in this matter and the identified issue, the following CONCLUSIONS OF LAW are presented.

Issue: **Whether the school corporation should provide an instructional assistant at the private parochial school**

The evidence and testimony presented during the Hearing focused on the school exercising its option under Article 7 511 IAC 7-4-4(c)(1) about where to provide special education services with regard to an instructional assistant. The school corporation maintains that it can provide a FAPE better in a public school building, where issues of safety, socialization of the student, quality of services, and accessibility can be addressed. There is no disagreement that the child needs the help of an instructional assistant, but where that assistant will provide help is the central issue. In considering the issue in this Hearing, the Hearing Officer considered several factors, including: (l) the wishes of the parent for their child to receive an education at the private school, (2) the school's obligations and options under Article 7 and the Individuals with Disabilities Education Act (IDEA), (3) the needs of the child, (4) issues of safety for the child, (5) accessibility, and (6) and a FAPE/least restrictive environment for the child, as per Article 7 and the IDEA. The best interests of the child must be considered simultaneously with the requirements of federal and state law. In this case, the parents have chosen unilaterally to place the child in a private parochial school. The school's

position to elect where to offer special education is within its option if it is not done for administrative convenience or there effectively is denial of services for which the student is eligible. There is no evidence that the school is attempting to abdicate its responsibility, and, in fact, can provide a barrier free environment that is wheelchair accessible, which the child likely will utilize soon. The possibility of injury to the child or assistant and exit in case of emergency cannot be-dismissed without appropriate consideration. The Petitioner maintains that the school cannot deny services to the child under federal regulations, even though state regulations may contain language allowing a school the option of where to provide related services. There is no requirement in federal or state regulations that a school must provide special education services in a private school where parents elect to enroll their child if a FAPE is available within the jurisdiction of the local education agency. It is the Hearing Officer's conclusion that a FAPE cannot be provided in the private school for the child, given current circumstances. Further, because the school is not refusing to provide the related service of an instructional assistant that would constitute a FAPE, they are permitted to exercise their option of where to provide these services. Thus, there is no evidence that the school's election to provide services at the school discriminates against the child or would result in the child being denied access to a FAPE. The evidence and testimony indicate that, at present, a FAPE can be better provided at the local public school. Therefore, the school is not obligated to provide the instructional assistant at the private school.

SPECIFIC ORDERS

Because the Hearing Officer has found in favor of the school's position, there are no Specific Orders, other than the school is ordered to continue providing the related services

of OT, PT, SLT, and transportation as per the IEP without interruption, assuming the parents wish to continue the services. The services are to be provided at the parents' option, even if they choose not to place the child in the public school.

All Parties to this Hearing have the right to appeal this decision by filing a Petition for Review with the Board of Special Education Appeals through the Division of Special Education within thirty (30) calendar days from the date of receipt of this decision.

Thomas J. Huberty, Ph.D.
Independent Hearing Officer
December 2, 1993

Before the Indiana
Board of Special Education Appeals

Hearing No. 712-93

Student:	Kayleigh Rudynski
Student's Parents:	Mr. and Mrs. Kevin Rudynski
Parent's Representative:	Dana L. Long, Esq.
School Corporation:	Anderson Community Schools
School's Representative:	David Gotshall, Esq.
Appeal Date:	March 11, 1994
Independent Hearing Officer:	Thomas Huberty, Ph.D.

BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS
ARTICLE 7 HEARING NO. 712-93

The Board of Special Education Appeals received oral argument from the parties on March 11, 1994 in response to a Petition for Review submitted by the parents of the child (daughter) which was received in the Department of Education on January 28, 1994. The other party in the original hearing was the Anderson Community School Corporation. The hearing was held on October 26, 1993. The decision of the Independent Hearing Officer (IHO) was rendered on December 2, 1993.

The hearing centered on the single issue of whether the school corporation should provide an instructional assistant for the student at the private parochial school. Since both parties were in agreement as to the need for services and the school had agreed to pay for related services and mileage for transporting the child to the related services, the only issue was "where" the instructional assistant was to provide the instructional support. In summary, the IHO's Findings of Fact established that the student was six years old, multiply handicapped, and eligible for special education services, including physical therapy, occupational therapy, and speech language therapy. She is non-ambulatory and has a need for considerable assistance with positioning for activities, self-help skills, and motor movements. currently the student is enrolled in a private parochial school at the election of the parents. The private school is largely inaccessible to the student. Although both parties agreed that an instructional assistant is needed for the student to receive full benefits from the educational program, there was disagreement as to where the services are to be provided.

The parents maintained the school is obligated to provide the services at the parochial school site, whereas the school maintained they have the right to select the site where services are to be provided. Thus, the school is proposing delivering the services at a local public elementary school.

APPEAL

The parent's Petition for Review was received by the Indiana Department of Education on January 28, 1994. The parents maintained that the IHO's decision was contrary to law in that it ignored federal law that requires provision of special education and related services to meet the needs of a private school student, and violates the student's right to attend a private school of choice. The Petitioner contended that the IHO's decision allowed state law to take precedence over federal law. Further, they objected to the decision in that the IHO considered liability concerns to be the overriding consideration as opposed to the educational needs of the child. In addition, the Petitioners maintained that the IHO's decision is arbitrary and capricious, is unsupported by the evidence, and was reached in violation of established procedure. Finally, the Petitioners maintained that the IHO exceeded his jurisdiction.

The School's response to the petition was received by the Indiana Department of Education on February 16, 1994. The school disagreed with all of the objections raised by the Petitioner and asked for the IHO's decision to be upheld.

The following is a summary of petitions, responses to petitions, motions, and Board actions.

1. Petitioner's (parents) Request for Extension of Time to prepare a Petition for Review was received by the

Indiana Department of Education on December 9. 1993.

2. The Indiana Board of Special Education Appeals granted the Petitioner's Request for Extension of Time on December 10, 1993, giving Petitioner's until February 2, 1994, to file a Petition for Review.

3. The parents' Petition for Review was received by the Indiana Department of Education on January 28, 1994.

4. The School's Request for Extension of Time to Respond was received by fax by the Indiana Department of Education on February 4, 1994, followed by hard copy received on February 7, 1994.

5. The Indiana Board of Special Education Appeals granted the School's Motion for Extension of Time on February 7, 1994, giving the School until February 17, 1994, to prepare a response.

6. The School's Response to the Petition for Review was received by the Indiana Department of Education on February 16, 1994.

7. The Board of Special Education Appeals, by letter dated February 25, 1994, and following consultation with the representatives for the parties, notified all parties that the Appeal would be held at 9:30 a.m. on March 11, 1994 at the Administration Building of the Anderson Community Schools in Anderson, Indiana.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Board of Special Education Appeals is the entity of the state duly empowered to review the Findings of Fact, Conclusions of Law, and Orders of the Independent Hearing Officer appointed under the provisions of 511 IAC 7-3 through 7-16 ("Article 7"). The Board of Special Education Appeals has jurisdiction in this matter.

2. The parties were afforded due process rights. both parties were able to present their evidence through witnesses, were able to conduct examination and cross examination, and stated their positions clearly. There is no evidence that the IHO violated any due process procedures.

3. All Findings of Fact made by the IHO are clearly substantiated by the record. There is no evidence in the record that the IHO was arbitrary or capricious in considering the evidence and in rendering his decision.

4. the IHO's Findings of Fact support his Conclusions of Law.

5. The IHO's Conclusions of Law support his decision to not issue orders.

FINAL ORDERS

1. Any Finding of Fact which may be considered a Conclusion of Law shall be considered a Conclusion

of Law. Any Conclusion of Law which maybe considered a Finding of Fact shall be considered a Finding of Fact.

2. The Board upholds the decision of the IHO. Motion carried unanimously.

3. Any and all other motions before the Board not specifically addressed herein are hereby denied.

Any party to the matter may seek judicial review of the Board's decision in a civil court with jurisdiction within thirty (30) calendar days from the date of this written decision.

Date: April 7, 1994

Raymond W. Quist, Chair
Indiana Board of Special
Education Appeals

Supreme Court, U.S.
FILED
OCT 28 1996
CLERK

No. 96-323

In The

Supreme Court of the United States

October Term, 1996

K.R., an infant by her parents and next friends M.R. and K.R.R., and M.R. and K.R.R.,

Petitioners,

v.

Anderson Community School Corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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24 pp

QUESTIONS PRESENTED

Whether 20 U.S.C. Secs. 1400 et seq. (IDEA) requires Anderson Community School Corporation to provide K.R., a child with disabilities as defined in IDEA, with an instructional assistant on the site of a private parochial school where K.R.'s parents have voluntarily chosen to enroll her when K.R. is virtually wheelchair bound and the private parochial school is not handicapped accessible.

Petitioners raise a second issue contending that Anderson Community School's conduct violates the neutrality principle under the First Amendment. Respondent *objects* to the presentation of this issue as it is raised for the first time in Petitioners' Petition now before this Court.

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JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was entered on April 12, 1996. The same Court's order denying Rehearing was entered on May 28, 1996. The jurisdiction of this Court is based on 28 U.S.C. Sec. 1254. The District Court jurisdiction was based on 20 U.S.C. Sec. 1415 (e) and 28 U.S.C. Sec. 1331.

STATUTORY AND REGULATORY PROVISIONS

The relevant federal statutes in this cause are 20 U.S.C. Sec. 1400 et seq., Individuals with Disabilities Education Act (IDEA). Federal regulations involved include 34 C.F.R. Sec. 300-403, 450-460, 506-511, 552; 34 C.F.R. Secs. 650-663. Indiana Statute, IC 20-1-6-4.

STATEMENT OF THE CASE

Respondent will follow generally the format adopted by Petitioner.

A. Statutory and Regulatory Scheme: Part B of IDEA provides for federal grants to be made through the state (SEA) to local education agencies (LEA) to assist in funding educational services for students with disabilities. As required by 20 U.S.C. Sec. 1412, Indiana has agreed to accept the provisions of IDEA. I.C. 20-1-6-4. Regulations have been adopted pursuant to 20 U.S.C. Sec. 1417.

A state which accepts the benefits of IDEA must have in effect a policy which assures all children with disabilities the right to a free appropriate public education (FAPE) and a plan assuring such an education is available. 20 U.S.C. Sec. 1412(1) and (2)(B). Each child identified as being disabled as defined by IDEA and regulations must be provided an individual education plan (IEP) that identifies the special education and related services necessary to meet the child's needs and must offer to provide those services at public expense. 20 U.S.C. Secs. 1412 (4), 1414 (a)(5).

The LEA must place a disabled child in a private school at public expense if it is unable to provide the services in a public school. 20 U.S.C. Sec. 1413 (a)(4)(B). Where parents voluntarily place their child in a private school, the state plan must have policies and procedures which assure

> (A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services . . .

20 U.S.C. Sec. 1413 (a)(4). If the parents voluntarily place their child in a private school "the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under Secs. 300.450-300.452." 34 C.F.R. Sec. 300.403.

34 C.F.R. Sec. 300.451 requires the LEA to meet the requirements of 34 C.F.R. Secs. 76.651-76.662. Under these regulations the LEA "shall provide students enrolled in private schools with a genuine opportunity for equitable participation and do so in a manner consistent with the number of eligible private school students and their needs." 34 C.F.R. Sec. 76.651 (a)(1) & (2). The LEA must consult with students' representatives regarding which children will receive benefits, what benefits they will receive, how the children's needs will be identified, and how the benefits will be provided. 34 C.F.R. Sec. 76.652 (a). The program benefits the LEA provides for private school students must be comparable in quality, scope, and opportunity for participation to those it provides public school students. 34 C.F.R. Sec. 76.654 (a).

Respondent adopts the Seventh Circuit's statement of the facts found on pp. 2-3 of its decision and which read as follows:

> It is not disputed that K.R. is a child with disabilities who is eligible under the IDEA for special educational and related services. K.R. was a six-year-old kindergarten student at the time this dispute arose. She suffers from myelomeningocele, spina bifida, and hydrocephalus with a shunt, which create difficulties with expressive language, motor skills, and mobility, requiring her to use a wheelchair. She thus needs assistance with positioning for activities, reaching and grasping, self-help skills, motor movements, mobility, and expression. Implementation of her IEP (determined in conformity with the IDEA) requires, among other necessary related services, a full-time instructional assistant.

K.R. received services from community agencies prior to attending public school at Anderson Community Schools. At age three, K.R. was enrolled in the pre-school program at the public school where she received various services related to her disabilities. In the spring and summer of 1993, case conference meetings were held to work out K.R.'s IEP for the 1993-94 school year in anticipation of her continued attendance at public school. The IEP provided for placement in a kindergarten class with related services for speech therapy, occupational therapy, transportation, and a full-time instructional assistant. During the conference, K.R.'s parents asked whether K.R. would receive all of the services if she attended St. Mary's School, a private parochial school. The public school told K.R.'s parents that it would not provide an instructional assistant if she attended private school. Nonetheless, K.R.'s parents voluntarily enrolled her at St. Mary's for kindergarten. During K.R.'s attendance at St. Mary's the public school has provided K.R. with speech therapy, occupational therapy, and physical therapy at a public school site, as well as transportation to that site. Since the local system determined that it would not provide K.R. with an instructional assistant on site at the private school, and since St. Mary's chose not to provide the service itself, K.R.'s mother attended St. Mary's with her to fulfill the duties of an instructional assistant prior to the District Court's decision.

K.R.'s parents requested a due process hearing, which was held on October 26, 1993. The hearing officer concluded that the public school is not obligated to provide an instructional assistant at the private school. The Indiana

> Board of Special Education Appeals upheld the decision on April 7, 1994. Having exhausted their administrative remedies, K.R. and her parents filed a complaint in the District Court. On May 25, 1995, the District Court issued a permanent injunction and declaratory judgment holding that the public school was required to provide a full-time instructional assistant at the private school. K.R. ex rel. *M.R. v. Anderson Community Sch. Corp.*, 887 F. Supp. 1217 (S.D. Ind. 1995). The District Court based its decision on a regulation that requires the special education services to private school students be "comparable" to the services provided to public school students.

In addition, Respondent would note that St. Mary's school is not wheelchair accessible. (Hearing officer's decision-finding of facts nos. 7 and 8 found at pp. A-46 to A-47 in the appendix to Petitioners' Petition). The school corporation has accessible facilities for wheelchair bound students.

At page 7 of their Petition, Petitioners state that the Anderson Community School Corporation "disagreed with the Circuit Court decision, . . . " This statement is incorrect. The school corporation disagreed with the District Court decision. The school corporation is in full agreement with the Circuit Court's decision.

The Seventh Circuit Court of Appeals overturned the District Court ruling on April 12, 1996. The Seventh Circuit held at page 11-12 of its decision (A-12, A-13 of Petitioners' appendix):

> We conclude that the IDEA and its regulations do not require a public school to make comparable provisions for a disabled student voluntarily attending private school as for disabled public school students. Rather, public schools are given discretion under the law and need only provide voluntarily placed private school students a genuine opportunity for equitable participation. Here, Anderson Community School afforded K.R. a genuine opportunity for the services of an instructional assistant at a public school, and she declined. Further, the public school's provision of other related services demonstrates that it reasonably exercised its discretion rather than eschew its responsibility once K.R. chose to attend private school. The decision of the District Court is therefore reversed.

Petitioners filed a petition for rehearing which was denied on May 28, 1996.

SUMMARY OF ARGUMENT

1. Under IDEA and its accompanying regulations, the decision of the Seventh Circuit Court of Appeals was correct. Both the statute itself and the accompanying regulations when read as a whole, grant the school corporation the right to determine where related services for a voluntarily enrolled private school student are to be provided. The Circuit decision in this case is not in conflict with any decision of this Court. The Seventh Circuit decision may be in conflict with a decision from the 2nd Circuit but the case at bar is not the appropriate case to clarify that apparent conflict.

2. The second argument made by Petitioners is that Anderson Community School's conduct constitutes a violation of the neutrality principle under the establishment clause of the First Amendment.

Respondent objects to any consideration of this issue because this issue was not raised in the prior proceedings and is raised by Petitioners for the first time in its Petition now before this Court. In any case, the actions of the Anderson Community Schools do not constitute a violation of the First Amendment's neutrality requirement.

ARGUMENT

1. Petitioners first argue that the Seventh Circuit's decision conflicts with *Zobrest v. Catalina Foothills Schl. Dist.*, 113 S. Ct. 2462, 125 L. Ed. 2d 1 (1993). That case dealt only with the constitutionality of providing a sign language interpreter at a parochial school. The Court specifically refused to address the statutory and regulatory arguments. See 113 S. Ct. at 2465-2466. The language from *Zobrest* cited by Petitioner at pp. 9-10 of its brief is in support of the proposition that providing a sign language interpreter on site at the parochial school is a neutral service and therefore not a violation of the Establishment Clause. In no way can the language cited from *Zobrest* be interpreted as holding that IDEA *mandates* providing an instructional assistant on site.

Petitioners argue that the Seventh Circuit's decision is not well founded because of its reliance on *Goodall v. Stafford County Schl. Bd.*, 930 F.2d 363 (4th Cir. 1991) which was decided before *Zobrest*. However, *Goodall* was

revisited by the 4th Circuit in 1995 wherein the Court stated:

> "[W]e note that in *Goodall* I, we held that the Individuals with Disabilities Education Act (IDEA) . . . did not dictate that Stafford County must provide or pay for the services requested by the Goodalls in Mathew's Christian School. 930 F.2d at 369. That portion of our opinion was not overruled by *Zobrest*, . . . and cannot be challenged in the instant appeal." *Goodall by Goodall v. Stafford County Schl. Bd.*, 60 F.3d 168, 173 (4th Cir. 1995)

Petitioners argue that the Seventh Circuit decision eliminates any choice which the student and parents may have. This contention is simply not supported by the law or the facts in this case. First of all, K.R. was voluntarily placed at St. Mary's with full knowledge that the *public school district* would not provide the instructional assistant on site. It did not prevent K.R. from still choosing to attend the private school.

The important point of the Seventh Circuit's decision is that the statute does not create *individual* rights for students who are voluntarily placed in private schools. Neither the Seventh Circuit Court decision nor IDEA eliminate the opportunity for St. Mary's to provide an instructional assistant on site. The decision merely holds that Anderson Community Schools is not required to pay for the instructional assistant in that case.

20 U.S.C. Sec. 1413 (a)(4)(A) requires each state plan provide policies and procedures which assure:

> (A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services . . .

It is important to note that the quoted statute states that provision must be made for voluntarily placed private school students "by providing for such children special education *and* related services." (emphasis added) If Petitioners' position is to be accepted then both the special education itself as well as the related services would have to be provided at the private school site. However, the LEA is clearly *not* required to provide the special education itself at the private school site. As long as the handicapped child has available a free appropriate public education, the public agency is not required to pay for that child's education when the parents have voluntarily enrolled the student at a private school. 34 C.F.R. Sec. 300.403 (a). *Burlington School Committee v. Dept. of Education,* 105 S. Ct. 1996 (1985).

As noted by the Seventh Circuit, the Department of Education has consistently interpreted the regulations as granting public schools discretion in providing benefits to students voluntarily attending private school. The Court at pages 9 and 10 of its decision cites the following authorities:

> 45 Fed. Reg. 22570 (1980) (stating that public school need only offer a genuine opportunity for equitable participation, and that what constitutes "genuine opportunity" will "vary widely,

> depending on local circumstances"); 49 Fed. Reg. 48522 (1984) (interpreting statute as providing public schools "with the discretion to devise . . . the most efficient scheme possible for providing adequate special education and related services to a number of, but not necessarily all, private school handicapped children" – an interpretation that "has been consistently followed by the Department"); 16 Educ. For Handicapped L. Rep. 1398-1400 (1990) (response letter stating that whether or not public school needs to provide on-site services at private school depends on the specific facts of each case); 20 Individuals with Disabilities Educ. L. Rep. 1440 (1994) (agency memorandum stating that private school children do not have an individual entitlement to the full range of services offered public school children, but must only be afforded a genuine opportunity for equitable participation); 22 Individuals with Disabilities Educ. L. Rep. 369 (1994) (responses letter stating same).

The Seventh Circuit goes on to correctly note at page 10 of its opinion:

> An agency's interpretation of its own regulations is entitled to substantial deference, unless it is plainly erroneous or inconsistent with the regulations. *Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381, 2386. Based on our analysis of the regulations, we find nothing plainly erroneous in the DOE's interpretation nor is it inconsistent with the regulations. We therefore adopt its interpretation as an accurate understanding of the law.

If Petitioners' argument were accepted, then it would confer upon voluntarily enrolled private school students rights *superior* to public school students. The parent of a public school student cannot unilaterally place their handicapped child in the public school of their choice and then demand that the special education and related services be provided at that specific location. See *Wilson v. Marana Schl. Dist. No. 6 of Pima Cty.*, 735 F.2d 1178 (9th Cir. 1984); *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir. 1988). If Petitioners' position were accepted then the parents could place their child in a private school and then demand that the services be provided at that location with absolutely no consideration for the needs of the public agency and with no discretion granted to the public agency. This was clearly not the intent of IDEA and its accompanying regulations.

Petitioners argue that the intent of Congress was inclusion of all handicapped children within its purview. They then argue that it was therefore intended to grant voluntarily placed students with the right to demand services on site. Respondent must respectfully disagree with this assertion. When the predecessor to IDEA was enacted there were many handicapped children who were not receiving any services at all. The intent of Congress was to encourage State agencies and local school districts to provide an *opportunity* for an appropriate public education for all handicapped students. The law speaks of a free and appropriate public education not a free and appropriate private education.

The law and regulations require that a portion of the funding provided under IDEA be spent on private school students. However, as the Seventh Circuit noted at page 4

of its decision, federal grants provide only about 8% of the funds needed to provide disabled students with special services. Only a proportionate amount of those federal monies must be spent on voluntarily placed private school students. The law does not mandate that state and local funds be expended on private school students.

Petitioners' reliance on 34 C.F.R. Sec. 76.654 (a) is also not well founded. To accept petitioners' argument would be to fly in the face of all the other statutory and regulatory provisions. As noted by the Seventh Circuit at page 8 of its opinion:

> Only Section 76.654(a), relied upon by the District Court, lends support to the notion that disabled students voluntarily attending private school must be treated the same as public school students. It states that the "program benefits that [an agency] provides for students enrolled in private schools must be comparable in quality, scope and opportunity for participation to the program benefits that the [agency] provides for students enrolled in public schools." 34 C.F.R. Sec. 76.654(a). But read in light of the statutory scheme outlined above and the other regulations, which precisely track the statutory division of public and private school students, the only reasonable interpretation of Section 76.654(a) is that the comparability requirement is limited to the "program benefits that [an agency] provides." Sections 76.651 and 76.652 explicitly give the public school discretion over what benefits to provide; however, when benefits are provided, Section 76.654 requires that they be comparable to benefits for public school students. Section 76.654 is not by its terms a

> mandate that private school students shall receive full benefits.

Petitioners contend that *Board of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2485 (1994) supports their position. This contention is incorrect. First, as Justice Scalia notes in his dissent:

> Unlike most of our Establishment Clause cases involving education, these cases involve no public funding, however slight or indirect, to private religious schools. They do not involve private schools at all. The school under scrutiny is a public school specifically designed to provide a public secular education to handicapped students." 114 S. Ct. at 2506.

Secondly, the quoted language is mere dictum. Thirdly, the quoted language speaks of "handicapped children" generally and in the plural, not each handicapped child individually. Respondent agrees that handicapped, private school children as a class have certain rights to some services under IDEA. However, *Kiryas Joel* does not hold that a voluntarily placed private school student has an individual right to services and the Seventh Circuit's decision is not in conflict with *Kiryas Joel.*

Petitioners next argue that the Court's decision changes the definition of "comparable benefits." They cite *Wheeler v. Barrera*, 417 U.S. 402, 94 S. Ct. 2274, 41 L. Ed. 2d 159 (1974) in support of their argument. *Wheeler* dealt with Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 241a et seq. which has some regulations which are similar to IDEA. *Wheeler* does not support Petitioners' contentions. The Court in *Wheeler* stated:

> Inasmuch as comparable, and not identical services are required, the mere fact that public school children are provided on-the-premises Title I instruction does not necessarily create an obligation to make identical provision for private school children." 417 U.S. at 421-422.

The *Wheeler* Court recognizes the same need for flexibility and discretion as the Court herein recognizes under IDEA. Like IDEA, Title I creates no individual student rights to specific services.

In addition, there are important differences between Title I and IDEA. IDEA clearly distinguishes between public school students and voluntarily placed private school students while Title I regulations "draw no distinction between public and nonpublic school children." *Wheeler, supra,* 417 U.S. at 406 n. 2. Title I deals solely with a federally funded program and the allocation of those funds, while IDEA creates obligations for the public school while financing only eight percent of the cost of those obligations. Under IDEA, the *federal* funds may need to be expended on a comparable basis but not the ninety-two percent provided by state and local sources. *Wheeler* provides no support for Petitioners. To the contrary, it provides support for the Seventh Circuit's decision.

Respondent would concede that the Seventh Circuit decision in the case at bar would appear to be in conflict with the Second Circuit's decision in *Russman by Russman v. Bd. of Education of the Enlarged City School Dist. of Watervliet,* 85 F.3d 1050 (2nd Cir. 1996). However, the *Russman* Court still holds that local school districts have the right to deny on-site services where the economies of

scale in providing the services at one place exist. However, Respondent's assertion in this case that it would cost more for the instructional assistant was rejected by the District Court. See pp. A-35 and A-36 of Petitioners' appendix. It would appear that since the cost would be greater to Anderson Community Schools to offer the services at the private school than at the public school, the *Russman* Court would have also decided in favor of Respondent.

Another reason for not necessarily comparing the *Russman* case with the case at bar and which would also weigh against granting Certiorari is the fact that the placement at St. Mary's school is *not* an appropriate placement. Placement of K.R. at St. Mary's school does not constitute the least restrictive environment and therefore is not the appropriate placement. IDEA mandates a free appropriate public education. In addition, that education must be provided in the least restrictive environment (LRE). 20 U.S.C. 1412 (5)(B).

> In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs. 34 C.F.R. Sec. 300.552(d).

The evidence in this case clearly established that St. Mary's school is not barrier free. K.R. would have to be carried up and down steps in order to initially get to her classroom and in order to attend art, music, physical education, recess and Mass. Such a situation creates a safety hazard. It therefore, creates a "potential harmful effect" for K.R. The public school, on the other hand, can provide K.R. a free appropriate public education which is entirely barrier free. The notes to 34 C.F.R. Sec. 300.552

indicate that the regulations for Section 504 of the Rehabilitation Act of 1973, 20 U.S.C. 794, are instructive in determining this issue. Section 504 provides that reasonable accommodation be made for disabled persons. In this case, a choice exists between placement in a school where a child with serious physical limitations may be placed in a school with numerous barriers to the student's movement in the school environment or one in which no such barriers exist. Clearly, the least restrictive environment for K.R. under the facts of this case is a placement in the public schools. The District Court rejected the Respondent's safety argument and never directly addressed Respondent's argument that St. Mary's did not constitute the least restrictive environment available to K.R. However, the State Hearing Officer found that a free appropriate education could better be provided in the public school than in the private school based on the barrier and safety issues. See Petitioners' appendix pp. A-43 through A-51. The Seventh Circuit did not have to address this issue since it reversed the District Court based solely on statutory and regulatory interpretation. However, the fact that St. Mary's is not barrier free and is therefore not the least restrictive environment forms another basis for denying Certiorari and also distinguishes this case from *Russman*.

2. Petitioners argue that the conduct of the Anderson Community School Corporation in denying K.R. an instructional assistant on-site at the private parochial school violates the neutrality principle of the establishment clause of the First Amendment.

Respondent objects to Petitioners raising this issue. Petitioners did not raise this issue in the State administrative proceedings, the District Court or the Circuit Court. They cannot now raise this issue for the first time in their Petition for Certiorari.

In any case, there is simply no basis for such an argument. If Anderson Community Schools were hostile to religion as alleged, it would not have provided the occupational therapy, physical therapy and speech therapy which it has provided to K.R. Anderson's decision not to provide an instructional assistant on-site was based in part on its belief that State and federal laws and regulations gave it the option as to where such services would be provided. Anderson's decision was also based on its belief that St. Mary's was unsafe for K.R., was not the least restrictive environment and was therefore not an appropriate placement. These reasons for rejecting an on-site instructional assistant would apply equally whether the private school were parochial, atheist or non-denominational. There is absolutely no evidence in the record to indicate that Anderson Community Schools are hostile toward religion. Petitioners are grasping at straws and this argument should be rejected out of hand.

CONCLUSION

For all the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 96-323

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

K.R., AN INFANT, BY HER PARENTS AND NEXT FRIENDS, M.R.and K.R.R., and M.R. and K.R.R.,
Petitioners,

v.

ANDERSON COMMUNITY SCHOOL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY MEMORANDUM

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Petitioners' Reply Memorandum

The Respondent, Anderson Community School Corporation, in its opposing brief in 96-323, raises two points which Petitioners feel require a reply:

I. Anderson Community School Corporation attempts to distinguish the facts of this case from the case of Russman by Russman v. Bd. Of Education of the Enlarged City School Dist. Of Watervliet, 85 F.3d. 1050 (2nd Cir. 1996).

A. Anderson Community School Corporation claims to have asserted in this case that it would cost more to provide the instructional assistant to K.R. at her private school than at the public school, which claim was rejected by the District Court. (Brief in Opp, pp. 14-15) Respondent's brief references pp A-35 and A-36 of Petitioners' appendix in support of this. Petitioners would point out that the sole reference, if any, to cost was footnote 7 of the decision of the District Court as shown on pp. A-35 and A-36, which is an interrogatory and answer submitted by Anderson Community School Corporation. No evidence of cost of providing an aid either at the private school, or at the public school was ever submitted. Further no cost comparison was ever submitted in the proceedings below, and in fact, it was never raised as an issue by the Respondent in this case. This issue should not be allowed to be raised for the first time before this Court.

B. Anderson Community School Corporation also states that another distinguishable fact from the decision by the Russman Court is the claim that the placement at St. Mary's School is not appropriate, as it does not constitute the least restrictive environment. (Brief in Opp. p.15) Respondent further alleges that because St. Mary's is not barrier free this creates a safety hazard for K.R. (Brief in Opp. p. 15)

Anderson Community School Corporation has continually raised this issue at the administrative hearing level, the District Court, and the Circuit Court of Appeals, as an issue it seems to believe overrides the underlying basic issue of whether IDEA, and its accompanying regulations require K.R. be provided an instructional assistant on site at a private parochial school. The District Court Addressed this in its opinion, and found:

> "The school corporation did not even raise any concerns about safety and accessibility until the administrative hearing, long after it had decided not to provide an instructional assistant at St. Mary's." (Dist. Ct. Op. pp. 36-37)

Respondent correctly indicates that the Seventh Circuit Court of Appeals did not address this issue because it reversed the District Court solely on statutory and regulatory interpretation. (Brief in Opp. p. 16)

Anderson Community School Corporation does fail to mention that it was advised at the oral argument before the Seventh Circuit Court of Appeals, that the Court did not believe safety and accessibility were an issue in this case.

Anderson Community School Corporation states that it is in full agreement with the Seventh Circuit Court of Appeals decision (Brief in Opp. p.5) If that is true, why are they again trying to raise this issue? Petitioners must object to this issue being raised if Respondent is in full agreement with the Circuit Court decision, as it would seem they had the opportunity to file a Cross-Petition under rule 12.3 of the U.S. Supreme Court Rules. The established doctrine governing appeals to the Appellate Courts and the Supreme Court, is that a party must cross-appeal or cross-petition if the party seeks to change the judgment below or any part thereof. Federal Energy

Administration v. Algonquin Inc., 426 U.S. 548, 560 n.11 (1976); Trans World Airlines, Inc. V. Thurston, 469 U.S.111, 118 n.14 (1985). Petitioners submit that Anderson Community School Corporation cannot, on one hand agree with the decision of the Seventh Circuit Court of Appeals, and on the other, try to alter that decision without having filed a cross-petition.

II. Anderson Community School Corporation, in its' opposing brief in 96-323, objects to the issue raised by Petitioners contending that Anderson Community School's conduct violates the neutrality principle under the First Amendment, on the grounds it is just now being raised for the first time before this Court. (Brief in Opp. p.i)

Petitioners would show the Court that this issue was previously raised and is clearly in the record below.

Petitioner's complaint, filed in the District Court on May 6, 1994, contains a Preliminary Statement which states in part:

> "Defendant's action in refusing to provide necessary special education and related services violates 20 U.S.C. Sections 1401 et seq. and the regulations promulgated thereunder and infringes on Plaintiffs' free exercise of religion rights secured by the First Amendment.....(Ct. of Appeals Rec. p. 5)

The Complaint at rhetorical paragraph 14 states:

> "The defendant's refusal to extend to K.R. the important government benefit of the special education and related services which are appropriate for her unless she leaves the private school and attends public school is a burden on the free exercise of your Plaintiffs' sincerely held religious convictions and beliefs which is protected by the

free exercise clause of the First Amendment of the Constitution of the United States....."(Ct. of Appeals Rec. p.8)

Petitioners in their Brief in Support of Complaint, at pages 15 through 21, before the District Court discuss the issue of K.R.'s First Amendment rights. (Ct. of Appeals Rec. pp.59-65) In specific, on page 17 of its brief in the District Court, Petitioners state:

> "The Supreme Court clearly states that IDEA provides a benefit to the child, not the school, and that IDEA benefits are to be distributed neutrally without regard to the sectarian-nonsectarian or public-nonpublic nature of the school the child attends." (Ct of Appeals Rec. p.61)

The District Court acknowledges in its opinion:

> "Plaintiffs also argue that even if the IDEA itself does not require the school corporation to provide an instructional assistant for K.R. at St. Mary's, the school corporation's failure to do so, along with K.R.'s acknowledged need for an instructional assistant imposes a substantial burden on their choice to have K.R. attend St. Mary's. Plaintiffs claim that this burden violates their First Amendment right to free exercise of religion..." (Dist. Ct. Op. pp.A 20-A 21)

In reaching its decision, the District Court states:

> "Because plaintiffs are entitled to relief under the IDEA, this Court need not decide whether the First Amendment's Free Exercise Clause and/or the Religious Freedom Restoration Act would

independently require the same result." (Dist. Ct. Op. p. 41)

Petitioners agree with Respondent that the Circuit Court did not address this issue in its decision. Petitioners, however, submit that, based on the above, it is clear that the First Amendment rights of K.R., including the neutrality principle, have been previously raised, and are still a significant issue in this case. Petitioners believe that the objection is not well founded and should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 96-323

In the Supreme Court of the United States

OCTOBER TERM, 1996

K.R., AN INFANT, BY HER PARENTS AND NEXT FRIENDS, M.R. AND K.R.R., ET AL., PETITIONERS

v.

ANDERSON COMMUNITY SCHOOL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Individuals with Disabilities Education Act requires participating States and localities to use their own funds to provide special-education services to disabled children whose parents have freely chosen to enroll them in private schools.

2. Whether respondent school district's refusal to provide certain benefits to private-school children violates the Religion Clauses of the First Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-323

K.R., AN INFANT, BY HER PARENTS AND NEXT FRIENDS, M.R. AND K.R.R., ET AL., PETITIONERS

v.

ANDERSON COMMUNITY SCHOOL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order of December 2, 1996, inviting the Solicitor General to express the views of the United States.

STATEMENT

1. a. Part B of the Individuals with Disabilities Education Act (IDEA) provides federal grants to States and, through them, to local school districts for assistance in the education of disabled children. Under a statutory formula, each participating State receives federal grant money based on, among other factors, the number of disabled school-age children in that State. 20 U.S.C. 1411(a) (1994); see also IDEA § 611, as amended by the Individuals with Disabilities

Education Act Amendments of 1997 (IDEA Amendments Act).[1] In recent years, Congress has actually appropriated only about six to eight percent of the approximately $35 billion needed each year to provide special services to disabled children throughout the United States. See Pet. App. A5. Put another way, although States and localities spend almost $6,500 more per annum to educate the average disabled child than the average non-disabled child, recent federal grants have accounted for only about $400-$500 of that amount per disabled child.

A State participating in Part B of IDEA must ensure that each disabled child within that State

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[1] On June 4, 1997, the President signed the IDEA Amendments Act into law. We have lodged with this Court a copy of the enrolled version of the bill, and we have reprinted the most relevant provisions of the new statute in the appendix to this brief. See also H.R. 5, 105th Cong., 1st Sess. (1997) (reproduced at 143 Cong. Rec. H2498-H2531 (daily ed. May 13, 1997)); S. 717, 105th Cong., 1st Sess. (1997) (addressed at 143 Cong. Rec. S4401-S4413 (daily ed. May 14, 1997)). (At the time of this filing, the IDEA Amendments Act had not yet received a Public Law number.) The amendments relevant to the grant formula for Part B will become effective "with funds appropriated for fiscal year 1998," IDEA Amendments Act § 201(a)(2)(D), whereas the amendment to the substantive provision directly at issue in this case—IDEA (as amended) § 612(a)(10)(A)—became effective upon enactment. IDEA Amendments Act § 201(a)(1); see also note 6, *infra*.

Because most of the amendments to IDEA are formally contained within Section 101 of the IDEA Amendments Act, for convenience we will cite the section of the newly amended IDEA that the Amendments Act assigns to a given provision. In discussing the terms of IDEA, we will often cite the relevant provision of the newly amended IDEA together with the original provision, as codified in the 1994 edition of the United States Code, that the amended provision supersedes.

has available a "free appropriate public education," IDEA (as amended) § 612(a)(1)(A); see also 20 U.S.C. 1412(2)(B) (1994), that includes all special-education services necessary to meet that child's particular needs. See IDEA (as amended) § 612(a); see also 20 U.S.C. 1412(4), 1414(a)(5) (1994); 34 C.F.R. 300.341; see generally *Board of Educ.* v. *Rowley*, 458 U.S. 176 (1982). School districts within participating States may discharge that obligation in one of two ways: either by making all necessary services available to a disabled child in the public schools or, where those schools cannot accommodate a child's disabilities, by funding that child's education in a suitable private school. See IDEA (as amended) § 612(a)(10)(B) and (C); see also 20 U.S.C. 1412(2)(B), 1413(a)(4)(B)(i) (1994); 34 C.F.R. 300.401(b).

A public school district has no similar obligation, however, to fund the education of a disabled child placed by his or her parents in private school if the school district has offered to provide all necessary services to that child in the public schools. See IDEA (as amended) § 612(a)(10)(C)(i); see also 34 C.F.R. 300.403(a).[2] Nonetheless, IDEA does require school districts to provide some special-education benefits to disabled private-school children in general. The extent of that obligation is the issue presented in this case. Under the version of IDEA in effect when this petition was filed, a participating State was required to ensure that, "to the extent consistent with the

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[2] Unless otherwise indicated, we will use the term "private-school children" as a shorthand to denote the class of children whose parents have freely chosen to enroll them in private schools, as distinguished from children who were placed by their local school districts in private schools.

number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services." 20 U.S.C. 1413(a)(4)(A) (1994).

On June 4, 1997, however, the President signed into law the Individuals with Disabilities Education Act Amendments of 1997, see note 1, *supra*, which clarifies the limited extent of a participating State's obligation to disabled private-school children:

> To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this part by providing for such children special education and related services *in accordance with the following requirements* * * *.
>
> > (I) *Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this part.*
>
> * * * * *

IDEA (as amended) § 612(a)(10)(A)(i) (emphasis added); see also *id.* § 612(a)(10)(C)(i) ("[s]ubject to subparagraph (A), this part does not require a local educational agency to pay for" special-education services for children placed by their parents in private schools). IDEA thus directs participating States and

localities to allocate a proportionate share of *federal* special-education benefits to disabled private-school children. Cf. *Wheeler* v. *Barrera*, 417 U.S. 402, 405-406 & n.3 (1974) (discussing administrative role of local agencies in providing federal educational benefits to private-school children). As amended, however, IDEA makes clear that it imposes no obligation on States and localities to spend *their own* money on services for such children.

b. The Department of Education has promulgated two different sets of regulations relevant to a participating State's obligations to disabled private-school children: the Part 300 regulations, which are specifically designed to implement IDEA, and the more general Part 76 regulations, which are a subcategory of the Education Department General Administrative Regulations (EDGAR). The Part 76 regulations do not refer to IDEA specifically, but they are applicable to the implementation of that Act both because they apply by their own terms "to each State-administered program of the Department," see 34 C.F.R. 76.1(a), see also 34 C.F.R. 76.2, and because the Department has made them applicable to IDEA participants by incorporating them by reference in the Part 300 regulations, see 34 C.F.R. 300.451(b); see also 34 C.F.R. 300.3(a). The Department promulgated each set of regulations well before enactment of the IDEA Amendments Act in June 1997, and, to the extent that any given regulation is inconsistent with that Act, it is superseded.

Part 76 provides that each local school district must ensure, among other things, that "[t]he *program benefits* that [the school district] provides for students enrolled in private schools [are] comparable in quality, scope, and opportunity for participation

to the program benefits that the [school district] provides for students enrolled in public schools." 34 C.F.R. 76.654(a) (emphasis added). As discussed below (see pp. 10-11 & note 4; see also pp. 17-18 & note 9), the Department interprets the term "program benefits" as it appears in the Part 76 regulations to refer only to the benefits provided under the federal grant program established in Part B of IDEA, *not* to the range of services each school district provides to disabled children with a combination of federal, state, and local funds.

2. Petitioner K.R. is an elementary-school child who suffers from serious impairments of the brain and spine. Those impairments require her to use a wheelchair and to have a full-time assistant available to move, position, and secure her. Pet. App. A2. As K.R. approached kindergarten age, respondent Anderson Community School Corporation prepared an "individualized educational program" for her, as IDEA requires. See 20 U.S.C. 1401(a)(20), 1414(a)(5) (1994); see also IDEA (as amended) §§ 612(a)(4) and 614(d); IDEA Amendments Act § 201(a)(2)(A) (effective date). Under the terms of that program, K.R. would have received, at public expense, a full-time instructional assistant during school hours if her parents had enrolled her in the public schools. Pet. App. A2, A17-A18, A23; see also Pet. 5.

For religious reasons, however, K.R.'s parents chose to enroll her instead in a parochial school. Respondent agreed to transport K.R. to a public school for certain special services, such as speech therapy, but it declined to provide her with an instructional assistant who would accompany her during her regular classes at the parochial school. Pet. App. A2-A3. K.R. and her parents sought administrative review

of that decision within the Indiana Department of Education. See 20 U.S.C. 1415(b)(2) and (c) (1994). An independent state hearing officer ruled in favor of respondent, Pet. App. A43-A51, as did the Indiana Board of Special Education Appeals, *id.* at A52-A57.

Petitioners then brought suit in district court under 20 U.S.C. 1415(e)(2) (1994), contending that IDEA and its implementing regulations require the school district to provide K.R. with a full-time instructional assistant at her parochial school. The district court granted the requested relief, Pet. App. A16-A41, on the grounds that 34 C.F.R. 76.654(a) entitled K.R. to services "comparable" to what she would have received at public school, and that "there simply is no 'comparable' alternative to in-class services provided by an instructional assistant." Pet. App. A32-A33.

The court of appeals reversed. Pet. App. A1-A13. It held that the text of IDEA, *e.g.*, 20 U.S.C. 1413(a)(4)(A) (1994), "leaves little doubt that * * * Congress intended to give disabled students voluntarily attending private school a lesser entitlement" to special-education services than they would possess either if they attended public schools or if they were placed in private school at the direction of their school districts. Pet. App. A8. The Department's regulations, the court explained, track that same distinction. *Id.* at A8-A9. Although the court acknowledged that Section 76.654(a) "lends support" to petitioners' position, it held that, under "the only reasonable interpretation," that provision does not "mandate that private school students shall receive full benefits," but requires only that a school district ensure the "comparab[ility]" of any special-education services it actually chooses, in its broad discretion, to provide to voluntarily enrolled private-school stu-

dents. *Id.* at A9. Indeed, the court added, petitioners' contrary reading would be inconsistent both with IDEA itself and with the Department's long-standing interpretation of its own regulatory scheme. *Id.* at A10-A11 (citing *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994)). The court thus concluded that a "public school has discharged its obligation" where, as here, it "makes available the necessary service at a public institution, giving the disabled student a genuine opportunity to participate, and nothing in the record indicates that it has otherwise abused its discretion." *Id.* at A11-A12.

DISCUSSION

1. In recent years, IDEA grants have supplied participating States and localities with only six to eight percent of the total amount needed to fund special-education services for disabled children.[3] No party disputes that, by participating in IDEA, States and localities incur an obligation to allocate that limited *federal* grant money among disabled children in public and private schools. The principal question in this case is whether IDEA also compels participating States and localities to spend much of *their own* money to ensure that disabled private-school children receive publicly funded special-education services generally "comparable" to those provided to public-school children. The IDEA Amendments

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[3] In this brief, we use the term "special-education services" to denote the range of services provided to disabled children but not to non-disabled children. Thus, the total cost of providing those services is roughly equivalent to the aggregate difference in cost between educating the average disabled child and educating the average non-disabled child. See p. 2, *supra*.

Act, signed into law on June 4, 1997, unambiguously confirms that IDEA imposes no such obligation on program participants. In light of that legislative clarification, this Court's review of the first question presented in the petition is unwarranted.

a. Before passage of the IDEA Amendments Act, several courts of appeals had expressed disagreement concerning whether 20 U.S.C. 1413(a)(4)(A) (1994) and its implementing regulations required participating States and localities to provide generally "comparable" special-education services to public- and private-school children, even though that requirement would (as discussed below) inevitably compel substantial expenditures of state and local funds. When issued, the Seventh Circuit's decision in this case, which affirmed the broad discretion of participating state and local agencies to choose the best means of allocating their own educational resources, was consistent with the decision of the only other court of appeals to have addressed the matter. See *Goodall* v. *Stafford County Sch. Bd.*, 930 F.2d 363, 366-369 (4th Cir.), cert. denied, 502 U.S. 864 (1991); see also *Goodall* v. *Stafford County Sch. Bd.*, 60 F.3d 168, 173 (4th Cir. 1995), cert. denied, 116 S. Ct. 706 (1996).

In *Russman* v. *Sobol*, 85 F.3d 1050 (1996), petition for cert. pending *sub nom. Board of Educ.* v. *Russman*, No. 96-776 (filed Nov. 18, 1996), however, the Second Circuit construed Section 1413(a)(4)(A) to require each school district to underwrite for private-school children roughly the same on-site special-education services that it provides for public-school children, except where doing so would be "significantly more expensive than providing the same services at the public school." *Id.* at 1057. Similarly, in *Cefalu* v. *East Baton Rouge Parish School Board*, 103 F.3d 393

(1997), petitions for reh'g pending, No. 95-31045, a divided panel of the Fifth Circuit adopted an intricate burden-shifting test, under which "private school students usually will, absent justifiable non-economic considerations, be provided comparable services on-site to the extent that such services can be provided on-site at the same approximate cost as that incurred in providing the services at other sites." *Id.* at 398; but see *id.* at 399-405 (Barksdale, J., dissenting) (advocating Seventh Circuit's approach). Finally, in *Fowler* v. *Unified School District No. 259*, 107 F.3d 797 (1997), petition for cert. pending, No. 96-1633 (filed Apr. 14, 1997), the Tenth Circuit followed *Russman* and *Cefalu* but went one step further, interpreting IDEA and its regulations to compel each local school district, whenever a service would in fact cost more to provide to private-school students, to "pay for that service [in] an amount up to, but not more than, the average cost to the [d]istrict to provide that same service to [disabled] students in the public school setting." *Id.* at 807-808.

The Department of Education, to which Congress has given authority to administer Part B, see, *e.g.*, 20 U.S.C. 1402(a) (1994); IDEA (as amended) § 603(a), had long construed Section 1413(a)(4)(A), even before its recent amendment, in a manner consistent with the decisions in this case and *Goodall* and inconsistent with the decisions in *Russman*, *Cefalu*, and *Fowler*. In 1984, for example, in rejecting proposals to give "State and local educational agencies * * * 'full service responsibility' for [private-school] children," the Department affirmed that IDEA and its implementing regulations preserved the "discretion" of States and localities to provide special-education

services "to a number of, but not necessarily all, private school handicapped children." Final Regulations, Assistance to States for Education of Handicapped Children, 49 Fed. Reg. 48,520, 48,521-48,522 (1984); see also *id.* at 48,524 (Section 1413(a)(4)(A) gives no private-school child any "individual entitlement to services"). The Department has consistently followed that interpretation from 1977, when it adopted the original implementing regulations for Part B of IDEA, see *id.* at 48,522, through the present.[4]

b. In the absence of the IDEA Amendments Act, this Court's review might have been necessary to resolve the disagreement among the courts of appeals on the meaning of Section 1413(a)(4)(A) and its implementing regulations. That disagreement, however, no longer merits this Court's review, because the Amendments Act has effectively resolved it.

Because IDEA grants subsidize only a small percentage of the cost of providing special-education services to the average disabled student (see p. 2, *supra*), the expenditure of a proportionate share of those federal grants could not, standing alone, provide private-school students as a class with anything more than a small fraction of the publicly funded services that public-school children receive through a combination of federal, state, and local money. Because

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[4] See, *e.g.*, Department of Education Opinion Letter to Barbara Burch, 23 Individuals with Disabilities Educ. L. Rep. 560, 562 (1996) (under IDEA and implementing regulations, "a public agency is not required to serve each and every private school child residing in its jurisdiction, nor to make the full range of services available to those children whom it has elected to serve"); accord Pet. App. A10-A11 (citing additional administrative materials).

the decisions in *Russman Cefalu*, and *Fowler* would often entitle private-school children to the full range of publicly funded services they would receive if they attended public school, those decisions effectively compel school districts to spend not just a proportionate share of their federal grant money, but also a substantial portion of their state and local money as well, to satisfy their legal obligations to such children. In *Russman*, for example, the Second Circuit construed the language of Section 1413(a)(4)(A) to require school districts to provide each private-school child with any service that would be economically no less efficient to provide on private-school premises than on public-school premises, 85 F.3d at 1056, even though such services, no matter where they are provided, must be underwritten principally with state and local funds.

In our view, even before passage of the IDEA Amendments Act, that requirement—like the similar requirements imposed in *Cefalu* and *Fowler*—was difficult to reconcile with the statutory text, which did not by its terms (or as construed by the Secretary) impose any such requirement on the States as a condition for participation in Part B, and therefore should not be understood to have done so. See *Board of Educ.* v. *Rowley*, 458 U.S. 176, 190 n.11, 204 n.26 (1982); see also 20 U.S.C. 1413(d)(1) and (2)(A) (1994) (requiring the Secretary of Education to "bypass" a State's role in certain circumstances and to provide special-education services to private-school children, but only in "an amount per child which may not exceed the *Federal* amount provided per [disabled] child" to the relevant State during the previous fiscal year) (emphasis added). Indeed, the Department of Education has informed us that, under the approach

followed in *Russman*, *Cefalu*, and *Fowler*, a State's federally imposed financial obligations to private-school children could approach or actually exceed the amount of its federal funding, a plainly anomalous result that would give the States a strong incentive to withdraw from IDEA altogether.

But even if such a requirement had been consistent with IDEA in its original, unamended form, it is now irreconcilable with Section 612(a)(10)(A)(i)(I) of IDEA as recently amended. That provision, which Congress designed specifically to "resolve * * * the subject of an increasing amount of litigation in the last few years," S. Rep. No. 17, 105th Cong., 1st Sess. 13 (1997), confirms that a school district's obligation under IDEA to fund special-education services for the category of children who are enrolled by their parents in private schools is limited to "a proportionate amount of Federal funds made available under [Part B]." IDEA (as amended) § 612(a)(10)(A)(i)(I); see also *id.* § 612(a)(10)(C)(i) ("[s]ubject to subparagraph (A), this part does not require a local educational agency to pay for" special-education services for children placed by their parents in private schools).[5] Because States and localities provide the overwhelming majority of public funding for special-education services, Section 612(a)(10)(A)(i)(I) necessarily forecloses any

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[5] See also S. Rep. No. 17, *supra*, at 13 ("[T]he bill specifies that the total amount of money that must be spent to provide special education and related services to children in the state with disabilities who have been place[d] by their parents in private schools is limited to a proportional amount (that is, the amount consistent with the number and location of private school children with disabilities in the State) of the Federal funds available under part B."); H.R. Rep. No. 95, 105th Cong., 1st Sess. 92-93 (1997) (same).

claim under IDEA that a disabled child placed by his or her parents in private school has an individual entitlement to any particular special-education service available to public-school children. Petitioners' statutory claim to relief in this case is therefore now without merit. They assert, on petitioner K.R.'s behalf, an individual entitlement to a full-time instructional aide on private-school premises. They do not, however, assert that respondent has allocated less than a proportionate share of its federal funding to private-school students generally. Cf. *Blessing* v. *Freestone*, 117 S. Ct. 1353, 1361 (1997).[6]

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[6] Section 612(a)(10)(A)(i)(I) became effective upon enactment of the IDEA Amendments Act on June 4, 1997. IDEA Amendments Act § 201(a)(1). That Act contains no provision addressing whether or not its provisions will have retroactive effect. See generally *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994). As discussed in the text, we believe that Section 612(a)(10)(A)(i)(I) clarified, rather than altered, a school district's existing obligations under 20 U.S.C. 1413(a)(4)(A) (1994); if so, the issue of the new provision's retroactivity does not arise. Nonetheless, even if petitioners could now assert a right to retrospective relief for the denial of services during the period before passage of the IDEA Amendments Act, that issue, which the court of appeals of course did not address, will have little continuing significance and would not warrant this Court's review. Moreover, because the court of appeals denied any relief (either retrospective or prospective) to petitioners, see Pet. App. A12-A13, there is no need to vacate the judgment below and remand this case for further consideration in light of the IDEA Amendments Act, which would lead to the same result. In contrast, this Court may wish to consider such a remand in *Russman* (No. 96-776) and *Fowler* (No. 96-1633). In each of those cases, the court of appeals *granted* prospective relief on legal grounds that appear to be inconsistent with the IDEA Amendments Act. (We have served copies of this brief

c. In claiming an individual entitlement to specific services, petitioners also rely (see, *e.g.*, Pet. 21-23) on the Department of Education's implementing regulations. See also *Fowler*, 107 F.3d at 802-809; *Cefalu*, 103 F.3d at 395-398; *Russman*, 85 F.3d at 1054-1057. Even if those regulations could once have been construed to support petitioners' position, and (in our view) they did not have that effect, they would now be superseded in relevant part by Section 612(a)(10)(A)(i)(I).

Petitioners focus not on the Part 300 regulations, which the Department adopted specifically to implement IDEA,[7] but on the Part 76 regulations, which are broadly designed to "apply to each State-administered program of the Department," 34 C.F.R. 76.1(a). Those latter regulations subject local school districts to a variety of procedural and substantive obligations concerning "program benefits" and "program funds." For example, the "comparable benefits" provision, 34 C.F.R. 76.654(a), compels each local school district to ensure that "[t]he program benefits that [it] provides for students enrolled in private

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on counsel for the parties in *Russman* and *Fowler*, along with counsel for the parties in this case.)

[7] The Part 300 regulations track the language of 20 U.S.C. 1413(a)(4)(A) (1994), see 34 C.F.R. 300.451(a), and they further require each local school district to "provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the [school district]," 34 C.F.R. 300.452. But they do not specify how comprehensive those services, or how large the class of beneficiaries, must be. In particular, nothing in the Part 300 regulations suggests that States and localities must spend their own funds, as opposed to a proportionate share of their federal grant, to satisfy their federal obligations to disabled children who are placed by their parents in private schools.

schools [are] comparable in quality, scope, and opportunity for participation to the program benefits that the [school district] provides for students enrolled in public schools."[8]

Like the Second, Fifth, and Tenth Circuits, petitioners interpret the Part 76 regulations to compel school districts, in many contexts, to make *their own* individual special-education "programs" equally available to public- and private-school children alike. See *Fowler*, 107 F.3d at 802-809; *Cefalu*, 103 F.3d at 395-398; *Russman*, 85 F.3d at 1054-1057. That position, however, misreads those regulations. The "program benefits" and "program funds" to which those regulations refer are most reasonably identified as the federal benefits and funds derived from the federal grant "program" under Part B of IDEA, not (as petitioners suggest) the actual set of services ultimate-

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[8] Part 76 also requires each school district, among other things, to "provide students enrolled in private schools with a genuine opportunity for equitable participation" in accordance with "the authorizing statute and implementing regulations for a program," 34 C.F.R. 76.651(a)(1); see also 34 C.F.R. 76.654(b); to determine the "needs of students enrolled in private schools," the "number of those students who will participate in a project," and the "benefits that the [school district] will provide under the program to those students" on a "basis comparable to that used by the [school district] in providing for participation of public school students," 34 C.F.R. 76.653; and to "spend the same average amount of program funds" on public- and private-school students who receive benefits under the program, unless the average cost of meeting the needs of private-school students is "different" from the average cost of meeting the needs of their public-school counterparts, in which case a school district "shall spend a different average amount on program benefits" for public- and private-school students, 34 C.F.R. 76.655.

ly offered, and principally paid for, by States and localities. Cf. Department of Health, Education, and Welfare, Final Regulations, Education Division General Administrative Regulations (HEW EDGAR Rules), 45 Fed. Reg. 22,494, 22,570-22,571 (1980).

To be sure, in mandating "comparability" only in the provision of *federal* "benefits" and "funds" to private-school children, the Part 76 regulations do little more than restate the statutory requirement that school districts allocate a proportionate share of their federal funds to private-school children.[9] Nonetheless, that is the only interpretation that reconciles those regulations with the text of IDEA

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[9] The generic Part 76 regulations were written to address a variety of federal grant programs that, unlike Part B of IDEA, fully fund whatever projects state and local recipients administer as part of those programs. In that (typical) context, it makes sense to impose on state and local agencies various qualitative requirements governing the allocation of "program benefits," because the educational services at issue are wholly identified with, and conceptually inseparable from, the federal grant program that completely underwrites them. Cf. HEW EDGAR Rules, 45 Fed. Reg. at 22,570-22,571 (conflating "services" that must be "comparable" under Part 76 regulations with "benefits" that are "federally funded"). Compared with other federal grant programs overseen by the Department of Education, IDEA is exceptional in that, in recent years, 92% to 94% of the funding for the services at issue has derived not from federal grants, but from the States and localities themselves. From that atypical circumstance arises a distinction, absent in other federal grant programs to education, between the ultimate "services" that States and localities provide to children and the federal "program" that underwrites a fraction of the cost of those services. That distinction, which was apparently unanticipated when the Part 76 regulations were promulgated, accounts for the reduced practical significance of those regulations in this context.

itself (see pp. 3-5, *supra*) and with the Department's own construction of the regulatory scheme as a whole (see pp. 10-11, *supra*). See generally *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994). In any event, even if petitioners' reading of the Part 76 regulations had once been correct, those regulations would now be superseded in relevant part by the IDEA Amendments Act. As discussed above, that Act sharply limits a school district's obligations under IDEA to disabled private-school students, and it squarely forecloses petitioners' statutory claim of individual entitlement to specific, publicly funded special-education services comparable to those that the State and locality furnish with their own funds to disabled private-school children.[10]

2. In their second question presented (see Pet. i), petitioners contend that the "neutrality principle"

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[10] *Wheeler* v. *Barrera*, 417 U.S. 402 (1974), upon which petitioners place heavy reliance (see Pet. 20-23), involved regulations implementing Title I of the Elementary and Secondary Education Act of 1965, which authorizes aid to children in certain low-income areas. Those regulations, which in some respects resembled the Part 76 regulations at issue here, required "comparable services" for public-school and private-school children alike. The plaintiffs in *Wheeler* were the parents of private-school children who had filed a class-action suit alleging that the services such children had received in a certain locality were inferior to the services provided to public-school children. This Court interpreted the Title I regulations to require true comparability in the services such children actually received. See 417 U.S. at 421-422 & n.17. The services at issue there, however, unlike the services at issue here, appear to have been funded entirely with federal grants and were therefore conceptually inseparable from the federal grant program itself; "comparability" thus required no expenditure of state or local money.

of the Religion Clauses of the First Amendment entitles K.R. to any special-education benefits she would have received had her parents enrolled her in public school. The court of appeals did not address that claim because petitioners did not raise it in that court until their petition for rehearing, cf. Pet. Reply Br. 5; this case is therefore an inappropriate vehicle for resolving the issue. In any event, the claim is without merit. Neither the Establishment Clause nor the Free Exercise Clause bars the government from allocating its limited educational resources principally to children attending public schools. See generally *Employment Div.* v. *Smith*, 494 U.S. 872 (1990); cf. *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 5 n.5 (1993).[11]

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[11] Although petitioners raised a claim under the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, in the district court, see Pet. App. A21, A41, they do not present that claim in their certiorari petition in this Court.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration in light of the Individuals with Disabilities Education Act Amendments of 1997 (approved June 4, 1997).

Respectfully submitted.

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JUNE 1997

APPENDIX

As amended by Section 101 of the Individuals with Disabilities Education Act (IDEA) Amendments of 1997, Section 612(a)(10) of IDEA provides, in relevant part, as follows:

SEC. 612. STATE ELIGIBILITY.

(a) IN GENERAL.—A State is eligible for assistance under this part for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:

* * * * *

(10) CHILDREN IN PRIVATE SCHOOLS.—

(A) CHILDREN ENROLLED IN PRIVATE SCHOOLS BY THEIR PARENTS.—

(i) IN GENERAL.—To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this part by providing for such children special education and related services in accordance with the following requirements * * *:

(I) Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this part.

* * * * *

(B) CHILDREN PLACED IN, OR REFERRED TO, PRIVATE SCHOOLS BY PUBLIC AGENCIES.—

(i) IN GENERAL.—Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this part or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

* * * * *

(C) PAYMENT FOR EDUCATION OF CHILDREN ENROLLED IN PRIVATE SCHOOLS WITHOUT CONSENT OF OR REFERRAL BY THE PUBLIC AGENCY.—

(i) IN GENERAL.—Subject to subparagraph (A), this part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

* * * * *

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No. 96-323

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

K.R., An Infant, By Her Parents and Next Friends, M.R. and K.R.R., and M.R. and K.R.R.,

Petitioners,

v.

ANDERSON COMMUNITY SCHOOL CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY BRIEF IN OPPOSITION TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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PETITIONER'S REPLY BRIEF IN OPPOSITION TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ISSUES PRESENTED

The United States in its Amicus brief in 96-323, raises two main points which Petitioners feel require a reply:

I. Has Part B of the Individuals with Disabilities Education Act (IDEA), as amended by the Individuals with Disabilities Education Act Amendments of 1997 (IDEA Amendments Act) caused the issue as raised in the Petition to this Court to be moot. *See* H.R.5., 105th Cong., 1st Ses. (1997) (reproduced 143 Cong. Rec. H2498-H2531 (daily ed. May 13, 1997, 105th Cong., 1st. Sess. (1997) (addressed at 143 Cong. Rec. S 4401-S4413 (daily ed. May 14, 1997)).

A. Petitioners raised the question of whether IDEA, and its accompanying regulations requires Anderson Community School Corporation to provide K.R., a child with disabilities as defined in IDEA, an instructional assistant on site at a private parochial school where K.R.'s parents have voluntarily chosen to enroll her. (Pet. for Cert. p. i) However, the United States now believes the IDEA Amendments Act changes that to be whether the Individuals with Disabilities Education Act requires participating states and localities to use their own funds to provide special education services to disabled children whose parents have freely chosen to enroll them in private schools. (Amicus p.(I)) The Petitioners disagree that the issue has changed. The core of the United States position centers on whether IDEA compels participating states and localities to spend local and state money to ensure that disabled private-school children receive publicly funded special education

services generally "comparable" to those provided to public school children. (Amicus p.8)

The United States concludes that participating states and localities are not so compelled as a result of the IDEA Amendments Act. (Amicus p. 9) Further, the United States concludes that IDEA (as amended) §612(a)(10)(A)(i)(I) only requires a proportionate amount of Federal funds by made available to those children who are enrolled by their parents in private schools. (Amicus p. 13)

DISCUSSION

Petitioners do not disagree that this is what the IDEA (as amended) now says, but do disagree that this so simply removes the issue from any further consideration. If the position taken by the United States regarding the IDEA (as amended) is indeed correct, Petitioners submit that instead of clarifying the question of whether K.R. is entitled to service at her private parochial school, the question is at best unchanged, and at worst further confused.

The IDEA (as amended) states that part of its purposes under §601 (d) are:

> "(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.
>
> (B) to insure that the rights of children with disabilities and parents of such children are protected and

> (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities."

See H.R. 5, p. 6

Clearly, the purpose of IDEA (as amended) is to ensure provision of services to all children and makes no distinction in its purpose between public and private school children with disabilities.

The IDEA (as amended) further states that in order for a state to be eligible for assistance, it must demonstrate that is has in effect policies and procedures to ensure that the state meets certain conditions in §612 (a), one of which is:

> "(1) Free Appropriate Public Education
>
> (A) In General-A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, . . ."

See H.R.5., p. 24

Another condition that a state must meet under §612 (a) is:

> "(3) Child Find-
>
> (A) In General- All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services."

See H.R.5, p. 25.

The State eligibility requirements under §612 (a) to this point also appear to refer to all children with disabilities, and make no distinction between public and private school children with disabilities. No distinction between public and private school children is discussed under §612(a) until §612(a)(10)(A)(i)(I):

> "(I) Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this part."

See H.R.5, p. 26 This section appears to limit the Federal requirements of §610(a)(10)(A)(i) which provides for participation by children in the program who are enrolled by their parents in private elementary and secondary schools. (This is found in the Amicus Appendix at p.(1a)). The United States in its Amicus Curiae brief, at pp 8-13, reasons that §612 (a)(10)(A)(i)(I) is dispositive of the issue raised by *K.R.* regarding the provision of comparable benefits to private school children, because the local school is now only responsible for the proportionate part of the Federal funds made available, and that the same applies to the comparable benefits decisions as revealed in *Russman v. School*, 85 F.3d 1050 (2d Cir 1996), *petitions for cert. pending sub nom. Board of Educ. v. Russman*, No. 96-776, *Cefalu v. East Baton Rouge Parish Sch. Bd.*, 103 F.3d 393 (5th Cir. 1997); *Fowler v. Unified Sch. Dist. No. 259, 107 F.3rd 797 (10th Cir. 1997), petition for cert. Pending*, No. 96-1633.

The United States fails to discuss §612(a)(18)(C) which states:

> "Prohibition against supplementation and conditions for waiver by Secretary. . ., funds paid to a State under this part will be used to supplement the level of

> Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this part and in no case to supplant such Federal, State, and local funds, except that where the State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive, in whole or in part, the requirements of this subparagraph if the Secretary concurs with the evidence provided by the State."

See H.R. 5, p. 32

As this section provides no exception for §612(a)(10)(A)(i)(I), to accept the reasoning of the United States would leave the IDEA (as amended) with provisions that are in conflict with each other. For the State or local educational unit not to use State money for provision of services to children with disabilities in private schools appears to be in direct violation of §612(a)(18)(C).

The position of the United States also fails to consider the repercussions to states as a result of the creation of the opportunity for the public school to simply discriminate based on cost against those students who are the most severely disabled. The application of IDEA (as amended) §612(a)(10)(A)(i)(I) as proposed by the United States would be in conflict with Title II of the Americans with Disabilities Act, 42 U.S.C. §§12131-12134.

42 U.S.C. §§12131 provides:

> "Subject to the qualifications of this subchapter. No qualified individual with a disability shall, by reason of such disability, be excluded from participation or

> be denied the benefits of the services, programs, or activities of a public entity"

This regulation at 28 C.F.R. §35.130 provides:

> "(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or be subjected to discrimination by any public entity."; and
>
> "b(1)(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others."

Although the Americans with Disabilities Act is not applicable to Federal Agencies, it clearly defines State and local units of government as public entities. *See* 42 U.S.C. §12131 Consequently, the United States position would leave states and local schools in a precarious position regarding disabled children's educational rights based on cost. IDEA (as amended) does take into consideration the Americans with Disabilities Act, and in fact, requires that any construction of new facilities or alterations of existing facilities must be in compliance with Americans with Disabilities Accessibility Guidelines for Buildings and Facilities at §605(b)(1).

See H.R.5 p. 11.

The second part of the position of the United States is to dispense with the requirements of 34 C.F.R. 76.654(a) which requires that the program benefits a local school district provides for students enrolled in private school are comparable in quality, scope, and opportunity for participation to the program benefits that the school provides for students enrolled

in public schools. (Amicus pp.15,16) The United States reasons that 34 C.F.R. 76.654(a) is no longer applicable in light of IDEA (as amended) §612(a)(10)(A)(i)(I). (Amicus p. 15) The United States concludes that IDEA (as amended) forecloses K.R.'s claim of statutory entitlement to specific, publicly funded special education services comparable to those the State and locality furnish with their own funds to disabled private school children. (Amicus p. 18) The United States cites *Wheeler v. Barrera*, 417 U.S. 402 (1974) and attempts to distinguish its decision regarding comparable services by limiting it to being applicable to only federal funds. (Amicus p.18n.10). Petitioners submit this is precisely the situation in *Wheeler*. Wheeler required true comparability in the services private school children actually received, and further held the mere offer to let private school children come to the public school system to receive the benefit Congress intended, did not comply with the statute's mandate. *Wheeler Id* at 421-425. The United States continues to claim that *Wheeler* does not apply. In fact, the language of 34 C.F.R. 76.654(a) is so similar to the language of the original 45 C.F.R. §121a.455 in support of 20 U.S.C. 1413 (a)(4)(A) of the Education for Handicapped Act, as to be indistinguishable in meaning. Further 45 C.F.R. §121a.455 was promulgated by the Secretary, citing *Wheeler* as authority in 1978. The United States contends that the district court in *K.R.* misinterpreted 34 C.F.R.76.654(a) as did *Russman*, *Cefalu*, and *Fowler* (amicus pp. 7-10). Petitioners submit that IDEA (as amended) does not change the issue in *K.R.*, nor does it change the issues in *Russman*, *Cefalu*, and *Fowler*. If the cases were remanded, then the possibility would be great that K.R. would not be able to receive services in Indiana, but if she lived in New York, Louisiana, or Kansas she could.

The IDEA (as amended) will effectively eliminate the freedom to place K.R. in a school of M.R. and K.R.R.'s choice

and receive benefits under IDEA, according to the United States interpretation. Yet no section of IDEA (as amended) is cited, or can be found, which indicates this change of purpose in the amendments. In *Zobrest v. Catalina Foothills Schl. Dist.*, 113 S.Ct. 2462, at 2467, this Court did determine that there is choice for such privately placed students under IDEA.

Petitioners submit that it is essential for the Supreme Court to grant Certiorari in this case, because there are still significant issues not resolved by IDEA (as amended) and which will continue to leave a conflict between the Seventh Circuit, and the applicable decisions of this Court, and the Court of Appeals for the Second Circuit, the Fifth Circuit, and the Tenth Circuit.

II. A. Has Part B of IDEA (as amended) created a violation of the neutrality principle of the establishment clause of the First Amendment.

The United States is interpreting IDEA (as amended) as allocating the IDEA financial resources particularly to children attending public schools. (Amicus p. 19). The United States further indicates this is not a conflict with the neutrality principle of the establishment clause of the First Amendment to the United States Constitution. Petitioners disagree with the United States interpretation of IDEA as amended) §612(a)(10)(A)(i)(I), and how it can limit the use of IDEA resources, so as to require K.R., and other children like her who are severely disabled to only be able to acquire services by attending public school. If this is so, then K.R. cannot be a private school student, but must become a public school student in Anderson Community Schools. Petitioners believe this interpretation clearly conveys a message of government enforcement or disapproval of K.R.'s religion and violates the core purpose of the Establishment Clause. *Grand Rapids School District v. Ball*, 473 U.S. 373,389, 87 L.Ed2d 267, 105 S.Ct. 3216 (1975 *See also Rosenberger v. Rector and Visitors*

of the University of Virginia, 115 S.Ct. 2510. 132 L.Ed. 2d 700 (1995); *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 114 S. Ct. 2481, 129 L.Ed.2d 546 (1994); *Board of Education v. Allen*, 392 U.S.2236, 2249, 20 L.Ed2d 1060, 88 S.Ct.1923 (1968).

B. Have Petitioners properly raised their second question dealing with the neutrality principle of the Establishment Clauses of the first Amendment (Pet. For Cert.)

The United States has challenged the Petitioners' second question as not being appropriately raised. Petitioners addressed this previously in their Reply to Respondent, Anderson Community School Corporation. (Reply pp. 3-5).

Petitioners would also submit that the passage of IDEA (as amended) raised the neutrality principal issue and it is necessary to an intelligent resolution of the case. *Vance v. Terazas*, 444 U.S. 252, 258-259 M.S (1980); *Cuyler v. Sullivan*, 446 U.S. 335, 342-343 (1980). Petitioners believe that this objection is not will founded and should be denied.

CONCLUSION

The amicus brief submitted by the United States reflects the same confusion regarding this issue as evidenced by the disparate court opinions in the similar cases cited previously. The petition for a writ of certiorari should be granted by this Court so that this split of authority between the districts can be resolved, and the parents, schools, children, and courts involved with these issues can receive the guidance they desperately need in order to confidently move forward in providing an education to children in similar situations.

Respectfully Submitted

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